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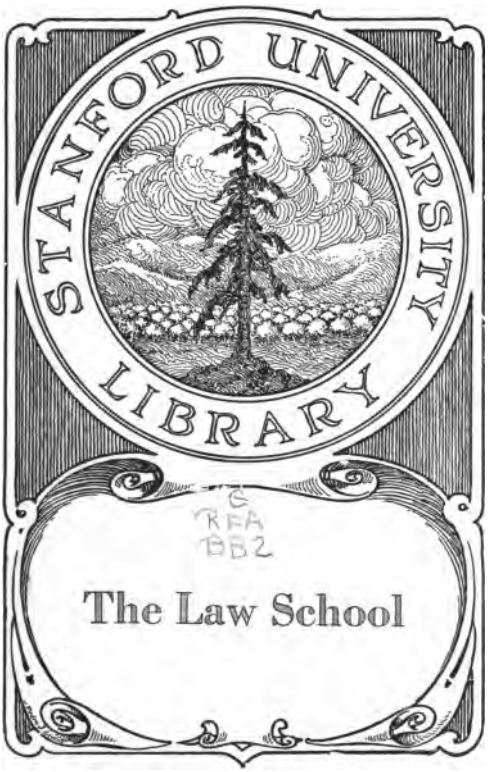

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The Law School

[redacted]-Reading Room

REPORTS

OF

CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

IN THE YEARS 1807, AND 1808.

POSTUS IGNORATIO JURIS LITIGIOSA EST, QUAM SCIENTIA.
CIC. DE LEGIBUS, DIAL. 1.

BY WILLIAM CRANCH,
Chief Judge of the Circuit Court of the District of Columbia.

SECOND EDITION,
REVISED AND CORRECTED BY THE AUTHOR.

VOL. IV.

NEW-YORK:
Printed by C. Wiley, No. 23 Provoost Street.
1812.

DISTRICT OF COLUMBIA, TO WIT.

BE IT REMEMBERED, That on the sixteenth day of May, in the thirty-third year of the Independence of the United States of America, WILLIAM CRANCH, of the said district, hath deposited in this office, the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"Reports of Cases, argued and adjudged in the Supreme Court of the "United States, in the years 1807, and 1808. Potius ignoratio juris liti- "giosa est, quam scientia.—*Cic. de Leg. Dial.* 1. By William Cranch, "Chief Judge of the Circuit Court of the District of Columbia. Vol IV."

IN CONFORMITY to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of "maps, charts and books, to the authors and proprietors of such copies du- "ring the times therein mentioned;" and also to an act, entitled, "An act, "supplementary to an act, entitled an act for the encouragement of learn- "ing, by securing the copies of maps, charts and books, to the authors and "proprietors of such copies, during the times therein mentioned, and ex- "tending the benefits thereof to the arts of designing, engraving and etching "historical, and other prints."

G. DENEALE,
Clerk of the District of Columbia.

L 9191
APR 12 1934

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

FEBRUARY TERM, 1807.

The following Judges attended at this term, viz.

THE HONOURABLE JOHN MARSHALL, CHIEF JUSTICE.
The honourable SAMUEL CHASE,
The honourable BUSHROD WASHINGTON,
The honourable WILLIAM JOHNSON,
AND
The honourable BROCKHOLST LIVINGSTON,
Who was appointed during the recess, in the place of the honourable WILLIAM PATERSON, deceased.
} ASSOCIATE JUSTICES.

Judge Cushing was prevented from attending by a severe illness.

Cæsar Augustus Rodney, Esquire, Attorney-General, in the place of John Breckenridge, Esq. deceased.

SUPREME COURT U. S.

FEBRUARY TERM, 1807.

THE UNITED STATES *v.* KID AND WATSON.

Round copper bars, round copper plates, and round copper plates turned up at the edges, are not subject to duty upon importation.

THIS case was *certified* from the circuit court of the district of Pennsylvania, upon a division of opinion between the judges of that court, upon the question whether certain articles of copper, viz. *round copper bars, round copper plates*, and *round copper plates turned up at the edges*, imported by the defendants, were subject to duty, within the meaning of the acts of congress, viz. 20th *July*, 1789, *and* 10th *of August*, 1790, vol. 1. p. 251. s. 1. by which "*copper in plates*" is exempt from duty, and *the act of the 2d of May*, 1792, vol. 2. p. 71. s. 2. by which "*copper in pigs and bars*" is also exempt from duty.

The jury found a special verdict, the substance of which was, that such articles as those in question are of no use in the form in which they are imported, but are worked up as a raw material. That the round, the square, and the flat bars are, by the manufacturers and artists, known by the denomination of "*bars*." That all the articles are sold by weight, and the same price is paid for round as for square or flat bars; and for round plates, and round plates turned up at the edges, as for square or oblong plates. "And that all the aforesaid *articles come under the description of bars and plates." * 2

Rodney, Attorney-General,

Admitted that the case was not to be supported, on the part of the United States, and that judgment must be given for the defendants.

JENNINGS *v.* CARSON.

The owner of a private capturing neutral property, is not liable to a decree of restitution unless the property or its proceeds, came to his hands.

The district courts of the United States are courts of *prize*; and have power to carry into effect the sentences of the old continental courts of appeals in prize causes.

In all proceedings *in rem*, the court has a right to order the *thing* to be taken into custody of the law; and it is to be presumed to be in custody of the law, unless the contrary appears.

* 3

The *thing* does not follow the appeal into the superior court, but remains in the court below, which has a right to order it to be sold, if perishable, notwithstanding the appeal.

THIS was an appeal from the sentence of the circuit court for the district of Pennsylvania, in a *cause civil and maritime*, in which *Jennings* was the *libellant*, and *Carson* the *respondent*; the former claiming to be owner of the sloop *George* and cargo, captured, in the year 1778, by the American privateer *Addition*, commanded by Moses Griffin, of which the respondent, Carson, was *part owner*, and which was libelled and condemned, on the 31st of October, 1778, as lawful prize, by the court of admiralty for the state of New-Jersey; from which sentence of condemnation there was an appeal to the continental court of appeals, established under authority of the old congress, where the sentence of condemnation was, on the 23d of December, 1780, reversed, and restitution ordered, but never obtained. In the mean time, however, the vessel and cargo had been sold by the marshal of the state court of admiralty, for paper money, under an order of the court contained in the sentence of condemnation, and it did not appear what had been done with that money. No measures were taken to enforce the decree of restitution during the old confederation.

On the 19th of May, 1790, after the adoption of the present constitution of the United States, Jennings filed his libel in the district court for the district of Pennsylvania, alleging that he was a subject of the States *General of the United Provinces, an inhabitant, and domiciled, at the island of St. Eustatius, and owner of the sloop George and her cargo, at the time of capture bound to the port of Egg-Harbour in the United States, and consigned to A. and G. Caldwell, in the prosecution of which voyage she was illegally captured by the privateer *Addition*, owned in part by the respondent, *Carson*, and praying process for arresting Carson, to answer, &c.. A supplemental libel was filed, setting forth the proceedings against the vessel in the court of admiralty of New-Jersey; the sentence of condemnation; the appeal; the reversal of that sentence, and the order of restitution.

Neither the original nor supplemental libel prayed any specific or general relief, other than process for arresting Carson, so that he should appear to answer the libellant " in his said complaint, of the *wrongs* and *injuries* aforesaid, according to the resolutions of the continental congress, the laws of the United States, and of the commonwealth of Pennsylvania, and the laws and usages of nations in this behalf practised, used, and established."

Carson, being taken upon the writ of arrest, appeared and filed his plea and answer, averring the sloop George to have been the property of a subject of the King of Great Britain, at the time of capture, and employed in carrying goods to the British army and navy; that the goods were imported directly or indirectly from Great Britain or Ireland, contrary to the regulations of congress and the law of nations; the King of Great Britain then being at war with the United States.

It admits that Carson was the owner of one third of the privateer. It admits the capture, the condemnation, and sale, the appeal and reversal, and the order of restitution, *but denies that any part of the proceeds of the sale ever came to the hands of the owners of the privateer, or either of them, but remained in the hands of the marshal of the court of admiralty of New-Jersey, who alone is answerable for the same.* It avers, that Griffin, the commander of the privateer, had probable cause for *making the capture, and, therefore, the owners are not liable. * 4

It denies the jurisdiction of the district court of Pennsylvania to take cognisance of the question, the same belonging exclusively to the court of admiralty of the state of New-Jersey, and to the court of appeals established by the continental congress. It denies the jurisdiction of the court as a *prize court* in any case, and especially in cases of capture made during the British war, and avers that it has no authority to carry into effect a decree of either of those courts established under the old government.

After filing his plea and answer, Carson died, and Jennings filed a petition, suggesting the death of Carson, *and charging his executors with assets*, and praying that the suit may stand revived against them; upon

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which a citation issued, and the executors appeared and answered generally by a reference to the answer and plea of their testator, and further *pleaded*, that by the law maritime, the law of the land, and the laws and ordinances of the United States, they, as executors, are not liable to be proceeded against in that court for the several matters set forth in the libel, for that they are not answerable for the *wrongs* and *offences*, or the pretended wrongs and offences, of their testator; and also, for that *courts maritime* have not authority to intermeddle with the estates and effects, real or personal, of deceased persons, or to give relief against the same, or to seize or take the same effects or estates in execution, or to imprison the bodies of executors for the default of the testator.

To these pleas and answers there were general replications.

On the 30th of March, 1792, the judge of the district court gave an opinion in favour of its jurisdiction in general cases as a *prize* court; but on the 21st of September, 1793, he dismissed the libel, on the ground that the district court was not competent to compel the execution of a decree of the late continental court of
*5 *appeals.(a) This sentence was affirmed in the circuit

(a) The following learned opinion of the Hon. Judge Peters, upon the *prize* jurisdiction of the district courts of the United States, is too important to be omitted.

"This is a case in which the general principles are stated in the proceedings and exhibits, and, therefore, will appear clear enough by the perusal of them. There are some circumstances, however, not clearly ascertained by those exhibits, which I shall have occasion to mention, in the course of the observations which I shall make on the merits hereafter. The libel complains of the illegal capture of the sloop George, whereof Robert Smith was master, and her cargo, the property of the libellant, then and now a subject of Holland, during the late war, viz. in July, 1778, by the schooner privateer *Addition*, *Moses Griffin*, commander, belonging to the testator, *Joseph Carson*, and others, who are named in the answer of *Joseph Carson*, in his lifetime.

"It is alleged, on the part of the respondents, that the vessel captured was employed in carrying goods belonging to the subjects of Great Britain, contrary to the regulations and laws of the then congress. They rely on the libel and condemnation in the state court of admiralty of New-Jersey, the verdict of the jury ascertaining the facts, and the condemnation by the court and order of sale, and for payment of the net proceeds to the captors.

"The sale of the vessel and cargo at vendue, and the moneys being received by the marshal of the court, in whose hands it is said they now remain in depreciated paper, not having been distributed

court on the 11th of April, 1798, but was reversed by *this* court at February term, 1799, so far as the same *decreed that the district court had no jurisdiction to

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*6

to and among the captors, and of course the respondents, or their testator, received no part thereof, and therefore they allege that the marshal only is chargeable to the libellant, and not the respondents or the testator. They insist that there was probable cause of seizure, and therefore the captors are not answerable in damages. They also plead in abatement to the jurisdiction of the court, because they assert that the subject of prize or no prize belongs to the admiralty of New-Jersey, and not to this court, which has no cognisance of the question; nor has it power to effectuate its judgment against executors. On the part of the executors particularly, an answer was put in denying their being chargeable for the *torts* of the testator, which, as well as their consequences, die with his person. But on an explanation on the behalf of the libellant, that he claimed no damages for the *tort*, merely as a *tort*, but sought for restitution of his property only, the point was abandoned by the advocates for the respondents.

"The libellant, to repel this defence, and denying, in the usual *form*, the facts as stated, sets forth the reversal of the judgment of the court of New-Jersey, by the decree of the court of appeals of the United States, the 23d of December, 1780, which contains a direction to the latter court to make restitution of the property, with costs, but not damages. They also join issue on the point of jurisdiction, and distinguish between a suit commenced in the lifetime of the testator, and one brought in the first instance against the executors.

"*Five* points were made by the advocates of the respondents; 1st. The *tort* dying with the person; 2d. The jurisdiction of this court is not competent, *as it is not a prize court*; 3d. and 4th. If a prize court, yet, as the cause originally attached in the court of New-Jersey, that was the only court in which the *consequences* were cognisable, and alone competent to effectuate the decree of the court of appeals; 5th. A capture with probable cause is not a subject of action for damages.

"The first point being waived, brings the question to the competency of jurisdiction, which in order, as well as necessity, should be the first point considered, because, if the court has no jurisdiction, it is nugatory to inquire into the merits of the cause. On this point, as it first struck me, I confess I had doubts. The account given by Lord Mansfield of the arrangement of the court of admiralty in England, as detailed in the case of *Lindo & Rodney*, produced hesitation, and my respect for the opinion of that great character, as well as the arguments of the advocates in the present cause, induced a deliberate consideration of the subject. The division of the court of admiralty into two sides, *prize* and *instance*, was new to me, and it is allowed not to have been *generally* known, if at all, by the common lawyers in England, before that case was determined. In this country it never was known, nor does it appear that any new commission was ever transmitted to the colonial judge of the admiralty from Great Britain before the revolution, in cases of wars between that kingdom and its enemies. I have traced, from records and other authentic information, the proceedings of the admiralty court of Pennsylvania, for a period exceeding

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carry into effect the decree of the court of appeals, and the cause was remanded to the district court for further

*7 *proceedings; the respondent being at liberty to con-

fifty years, and I have the best reason for believing that the practice in other colonies was similar. In all the proceedings, the *prize* suits are called suits *civil* and *maritime*. During the late war, when we assumed and effected our independence, the proceedings were unaltered in this point. I do not find that there is any such distinction in any other nation, except it should be found in Holland, and of this I much doubt. The authority out of Bynkershoek, (177.) produced by one of the advocates for the respondents, founded on an ordinance of the Earl of Leicester, shows that there is a court there whose authority is entirely confined to captures as prize, and it has no jurisdiction even of other maritime cases. This, therefore, is not applicable to a question concerning the powers of a court of *admiralty*, which is allowed, even in the case of *Lindo & Rodney*, to possess jurisdiction in all maritime causes, though in England it is said to act under a peculiar (and therefore not generally known) organization. I take it, therefore, for granted, because the contrary has not been shown, that in England alone are these distinct branches of the same court to be found. In all the books of reports in which cases of prohibitions to the admiralty are mentioned, precedent to the case of *Lindo & Rodney*, these prohibitions are moved for and granted generally to *the court of admiralty*; and though in a case in *Term Reports*, (long after the case of *Lindo & Rodney*,) the distinction is taken, and the prohibitions moved for to the *prize* court, this very instance shows it to be a novelty in the common law books there, for if it had been known as an old practice, the particular designation of the *prize court* would have been unnecessary, and the prohibition would have been required to the *admiralty generally*, as it ever had been in former cases.

"Acting, as we now do, in a national, and not a dependent capacity, I cannot conceive that we are bound to follow the practice in England more than that of our own or any other nation. Customs purely colonial, were parts of our laws, even in the time of our connection with Britain. I need instance only one, viz. that of the mode of conveyance of *feme coverts'* estates, contrary to the laws of England. This is a case at common law, in which we then were, and now are, particularly called to follow their rule and practice in general. The admiralty proceeds from a law which considers all nations as one community, and should not be tied down to the precedent of one nation, though it were more clearly ascertained. I shall, therefore, conclude, that if the powers of an *admiralty* and *maritime court* are delegated by congress to this court, those of a *prize* court are mixed in the mass of authority with which it is invested, and require no particular specification. They are called forth (if generally delegated) by the occasion, and not by repeated and new interferences of government. Nor do I believe that *even* in *England*, any new authority is vested, though a kind of legal and solemn notice is given of a war, in which subjects for the prize authority of the admiralty may occur. It does not begin with their wars, but was pre-existent. It does not end with the commencement of peace, for their books show it to be exercised at any time afterwards. Government never interferes to put an end to it: how

tend before that court, as matter of defence to the merits, or to the form of proceedings, that the libel should first *have been filed in the *district* court of *New-Jer-*

*8

then can its power be repeatedly necessary to begin it? The fact is, it is inherent in a court of admiralty, and not lost, but torpid, like other authorities of the court, when there are no occasions for their exercise.

"But here the question arises, have congress, by their judiciary laws, vested this court with *general* or *special* admiralty powers? Congress have authority (delegated by the people in the constitution) in "all cases of admiralty and maritime jurisdiction." The words of that part of the judiciary law affecting this subject, in which the authorities of the court are described, will be seen in the 9th section of that law. "It shall also have exclusive original cognisance of all *civil causes of admiralty and maritime jurisdiction*, including seizures under laws of impost, navigation, or trade, of the United States." It is said *prize* or *no prize* is a question of *military*, not of a *civil* nature. But I find no such distinction in the books. Blackstone, in his division of courts, does not class that of the admiralty as a *military*, but a *maritime* court, and it will appear that the jurisdiction of prize is within its powers, though he points out, in cases of prizes in the then colonies, that appeals were to members of the privy council, and others, in consequence of treaties and domestic arrangements. But, he says, "the original court to which this question is permitted in England, is the *court of admiralty*," without any distinction as to the nature of its powers, whether *instance* or *prize*, *military* or *civil*. In book 3. p. 108. he mentions the exclusive and undisturbed jurisdiction of the courts of admiralty, in cases of prize; and that court determines, not according to *British laws* or *practice*, but "according to the law of nations." Should I confine my attention merely to the inquiry whether this could be classed under the description of a "*civil cause*," I should think there were grounds to support the idea of its being comprehended. In the case of *Acheson & Everett*, (*Cowp.* 382.) some light is thrown on this view of the subject, because it appears that a *civil* suit may, in substance, but not in form, partake of *criminal* ingredients. So, by parity of reason, may a *civil cause of admiralty and maritime* jurisdiction, be mixed with, or grounded on, transactions of a *military* nature. But I do not think it necessary merely to fix this point. What is, perhaps, of most consequence is, to ascertain the intention of congress in distributing a power, clearly in *them*, to their judiciary departments. And what was said by one of the advocates for the libellant, strikes me as being just and proper, viz. that the construction should be made, from a consideration of all the laws on the subject, *in pari materia*. "The court shall also have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including," &c. that is, being invested with criminal powers in certain cases, it shall also have *civil powers*, as *opposed to criminal*, in admiralty and maritime cases. By recurring to the 12th, 13th, 19th, 21st, and 30th sections of the judiciary law, it will appear that congress meant to convey all the powers, (and in the words of the constitution,) as *they* possessed them, in admiralty cases; and actions or suits in these cases can originate only in the *district courts*.

"For the foregoing reasons, and some others which might be add-

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sey, but not to make the decision of the judge on that point a ground of excepting to the jurisdiction of the district court of *Pennsylvania*, and that costs should await the event of the cause.

*9 *Upon the second hearing of the cause, on the 2d of April, 1802, the judge decreed in favour of the libellant, for the amount of sales of the sloop and cargo, reduced by the scale of depreciation, with interest, until two months after the order of restitution by the court of appeals; and from the time of the institution of the present suit until the day of final decree; which decree was, on the 10th of May, 1804, reversed by the circuit court, *and the libel dismissed with costs.* From which sentence the libellant appealed to this court.

E. Tilghman, for the appellant.

No delay can be imputed to the appellant. There was no limitation by law. The federal court of appeals was unpopular in those states who were attached to the trial by jury, and its jurisdiction was opposed with great warmth. He cited the case of the *sloop Active*, and *Mr. Olmstead's Case*, and an act of the legislature of Pennsylvania in support of that assertion. The jurisdiction of that court was not finally settled until the case of *Doane & Penhallow*, 3 *Dallas*, 54. 85, 86.

He considered the case under six heads.

1. That if the appellant was entitled to redress, he was right in applying to the *district court of Pennsylvania*, and was not obliged to resort to that of *New-Jersey*.

2. That if his suit was rightly commenced in the district court of Pennsylvania, that court had authority to decide finally on the case.

3. That the district court has jurisdiction of the question of *prize*.

4. That, if the appellant is entitled to redress, his remedy survives against the executors of Carson.

ed, I am of opinion that this court possesses *all the powers of a court of admiralty*, and that *the question of prize* is cognisable before it. I have gone thus far into the discussion of this point, because I believe it is the first time it has been agitated in a federal court.

"I do, therefore, decree, adjudge and determine, that the plea to the jurisdiction of the court, as not being competent to determine on prize questions, be, and the same is hereby overruled."

5. That it is immaterial whether there was or was *not* probable cause for the capture.

*6. That the *owners* of the privateer are answerable for the acts of the captors, their agents. * 10

1. As to the first point.

One court of admiralty is competent to carry into effect the sentence of another; even of a foreign court, and *à fortiori* of a domestic court. *Douglass*, 1. *Walker* v. *Witter*. 1 *Vent.* 32. *Jurado* v. *Gregory*. 1 *Lev.* 267. S. C. 6 *Vin.* 535. pl. 20. 1 *Salk.* 32. *Broom's Case*. *Carth.* 398. S. C. 2 *Lord Raym.* 935. *Ewer* v. *Jones*. 3 *Dall.* 97. and 118. *Penhallow* v. *Doane*. 2 *Browne's Civ. & Ad. Law*, 120.

The sentence of the court of appeals consists of three parts. 1st. Restitution; 2d. Costs; 3d. An order to the court below to carry the sentence into effect.

The sentence was for restitution of the *thing itself*, not of its value; nor of the amount for which it was sold. The appellant was not obliged to take any thing in lieu of the thing itself.

If a judgment at common law is rendered against a plaintiff in the circuit court, and that judgment reversed in the supreme court, and a mandate issues to the circuit court to execute the judgment of the supreme court, the plaintiff is not bound to take out his execution under the mandate, but may bring an action of debt upon the judgment, in any district of the United States where the defendant may be found. So in this case, the claimant may libel the captors in any district where they may be found. We are not bound to take the proceeds of the sale in continental money. The reversal was on the 23d of December, in the year 1780, when paper money was a mere *ghost*, and worth nothing. It is immaterial what became of the money, and whether it sunk in the hands of the marshal, or not. If our cargo had been suffered to arrive, we might have sold it so as to avoid the effect of depreciation.

The resolution of congress, which provides that captured vessels should be libelled in the district into which *they should be brought, applies only to libels *by the captors* against the *property*, and not to libels *by the claimant against the captors*. These, *ex necessitate*, must be brought where the captors may be found. We cannot now proceed in the original court of admiralty * 11

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of New-Jersey, for it does not exist. It was a court deriving its authority from the state of New-Jersey alone. By the constitution, *all admiralty powers* are now vested in the *courts of the United States*, and to those only can we now apply.

2. If the suit was rightly commenced in the district court of Pennsylvania, that court had authority to decide finally on the case.

The words of the decree of restitution are all powerful—"*the vessel and cargo* SHALL BE *restored.*" We are, therefore, entitled to the thing itself, or its *full* value.

If it be objected that the loss by depreciation is not chargeable to the respondents, we say that it is a fundamental rule that he who does the first wrong shall be liable to *all* the damages.

The act of the marshal was the act of the captors. His sale made after the appeal, was or was not regular. If regular, the proceeds were received to the use of the captors; if irregular, although under the order of the court, the captors are liable. 12 *Mod.* 639. *Roswell* v. *Prior.* 5 *Vin. Abr.* 405. 1 *Vernon*, 297—307. *Childerns* v. *Saxby.* 6 *Mod.* 179. *Regina* v. *Tracy.*

At common law, if the judgment be reversed after goods sold under a *fi. fa.* the writ of restitution is to the plaintiff, and not to the officer; and the plaintiff must answer the *value*, not what they actually sold for. 2 *Salk.* 588. *Cro. Eliz.* 209. *Rook* v. *Wilmot.* 390. *Atkinson* v. *Atkinson.* 11 *Mod.* 36. *Clerk* v. *Withers.* *Vin. Abr.* tit. *Distress*, 171. pl. 1, 2. *Bro. Abr. Distress*, pl. 72.

The sentence of the court of appeals is conclusive that the capture was wrongful. It was a marine trespass. If the sloop had been taken by the British out of the hands of the captors, they would still have been liable. *1 *Dall.* 95. *Talbot's Case.* 3 *Dall.* 333. *Del. Col.* v. *Arnold.* 3 *T. R.* 333. *in notis*, *Livingston and Welch* v. *M'Kenzie.*

*12

3. The third point, viz. that the district courts of the United States have jurisdiction in questions of *prize*, was admitted by the opposite counsel.

4. If the libellant is entitled to redress, his remedy survives against the executors of the owners of the capturing vessel.

The decree of the court of appeals is for *restitution*

only, and the prayer of the libellant is for general relief, which is in all cases sufficient. 3 *Dall.* 86, 87. 107. 118. *Penhallow* v. *Doane.*

It is a rule in the civil law, that if the ancestor has appeared to the suit, the heir will be liable, and it is a maxim in equity that the heir shall be liable, even in cases of *tort*. *Domat*, 605. 607, 608, 609. *Cowper*, 374. 376. *Hambly* v. *Trott*. *Grotius*, b. 2. c. 21. s. 19, 20. *Vinnius*, 785. 787.

5. To support his fifth position, that it is immaterial whether there were probable cause or not, he relied upon the cause of *Del. Col.* v. *Arnold*, 3 *Dall.* 333.

6. That the owners of the capturing vessel are liable for the acts of the captors. In support of this position he cited 4 *Rob. Rep.* 293. *The Picimento.* 292. *The Venus.* 1 *Dall.* 108. 3 *Dall.* 334. 3 *Dall. Penhallow* v. *Doane.*

Lewis, on the same side, offered to read authorities to show that the appeal not only suspended the sentence, but the order to sell, unless a special power was given to the court to proceed to sell notwithstanding the appeal.

Hare, contra, contended,

1. That the district court of Pennsylvania had not jurisdiction.

2. That the case of the libellant was void of merit. * 13

1. If the proceeding is not against the *prize itself*, nor the *proceeds* of the sale of the prize, nor against the *persons of the captors*, a prize court has no jurisdiction. No case can be produced, where a prize court has taken jurisdiction merely against the *persons of the owners* of the capturing vessel. It is even doubted whether a court of admiralty could entertain a suit against the *proceeds* in the hands of the agent of the captors. "Proceedings upon prize are proceedings *in rem*; and it is presumed that the body and substance of the thing is in the country which has to exercise the jurisdiction." 1 *Rob. Amer.* ed. 119. *The Flad Oyen.*

The jurisdiction of a court of viceadmiralty extends only to things brought within its authority. 3 *Rob.* 53. *The Carel and Magdalena.*

The sentence of the court of appeals required the

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court of admiralty of New-Jersey to cause restitution to be made. If the former sentence in New-Jersey is complete, it is a bar to a subsequent suit. If it is *not* complete, but is still pending, it is equally a bar. 3 *Bac. Abr.* 653. *Prec. in Chan.* 579.

2. As to the question of merits. Upon this subject the case of *The Mentor*, 1 *Rob.* 151—153. is in point. This also is an *antiquated claim*, and not prosecuted against the actual wrongdoer, but against persons who were not present at the act complained of. Besides, there was probable cause, and, therefore, no damages can be given. 1 *Rob.* 82. *The Betsey.* The sloop had sailed under a British convoy; this was a strong ground of suspicion, and, added to the false account of her destination, her want of papers, and the destruction of papers, was sufficient ground to excuse from damages and costs. 3 *T. R.* 332. *Smart* v. *Wolf.* 1 *N. Y. Term Rep.* 64. *Jenks* v. *Hallet. Doug.* 581. *Bernardi* v. *Motteux.* 1 *Marshall*, 317. The sentence of the court of admiralty of New-Jersey is of itself conclusive evidence of probable cause. 1 *Wils.* 232. *Reynolds* v. *Kennedy.*

* 14 *The sale was the act of the court, and not of the party.

The case of sale under a distress is not analogous; it is the act of the party alone. It is not under the judgment of a court. The sale produced a fund to which alone the libellant can resort. If a collateral security be given, and if that be lost by the *laches* of the party, he shall never recover.

From the date of the reversal of the decree, the marshal held the money to the use of the present libellant.

The rule of the civil law as to *torts* is the same with the rule of the common law, *actio personalis moritur cum persona.*

The Court stopped *Ingersoll*, on the same side, and said, that the point which it would be difficult to establish on the part of the libellant is, that he would have been entitled to any remedy against the present appellees, even on the very day after the sentence of the court of appeals.

Lewis, in reply.

The sentence of the court of appeals is conclusive

evidence of the falsity of the original libel, and that the capture was *tortious*.

That the present libellant is entitled to relief, in *some* form and in *some* court, cannot be questioned. It is not a case of common law jurisdiction, and there is no *state* court of admiralty in New-Jersey. If any court has jurisdiction, it must be a district court of the United States.

Two questions arise in the cause.

1. Is the libel filed in the proper court? and,

2. To what extent is the libellant entitled to relief?

*1. A neutral is entitled to restitution; and if the captor will not proceed against the property in a reasonable time, the owner may libel the captors, and pray that they may proceed to adjudication, or restore the property. * 15

The captured property must be considered as in the power and possession of the captors. The sale makes no *difference*, unless made by *consent*, or because the property was *perishable*, or under some act of congress or other statute law.

The British statutes require that the captured property should be taken into the custody of certain officers of the government, or of the court, and thereby might be considered as in the custody of the law; but congress had no such officers; the custody remained with the captors until trial and acquittal or condemnation. *Resolve of Congress of* 27th *of November*, 1774. If it had been a sentence of acquittal, a writ of restitution would have issued. A mandate would have been vain, unless the court had power to execute the sentence.

JOHNSON, J. inquired of Mr. Lewis whether in his practice he had known any instance in which, upon filing a libel, a warrant has not issued to take the captured property into the custody of the marshal.

MARSHALL, Ch. J. It is certainly important to ascertain in *whose custody* the property was. I had all along considered it as in the *custody of the law*.

Lewis. I have had an opportunity of knowing a great deal of the admiralty practice during our revolutionary war, being concerned in all the cases in Pennsylvania,

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and in all the appeals from the state courts. I do not know an instance in which such a warrant has issued. But the records of the court of appeals are in the office of the clerk of this court. In this very case there was no such warrant.

LIVINGSTON, J. It appears that the sale was made by the marshal under the order of the court. Must we not presume that the court knew and did its duty; and that the goods were in a perishing condition?

* 16 *Lewis. If the general practice was *not* to issue such a warrant, but to suffer the property to remain in the hands of the captors, and no warrant appears in this record, which ought to be presumed to contain *all* the proceedings in the case, the presumption is, that no such warrant ever was issued; especially if such warrant was not rendered necessary by the law.

There was no writ or warrant of sale from the court to the marshal. The order of sale is embodied in the final decree itself. It was made before the appeal, and while the court had the power to make such an order.

But the appeal suspended both the power to condemn and the power to sell. The appeal suspends the sentence as to every purpose whatsoever, unless the power of sale after appeal be given by express law, or unless the goods are in a perishing condition.

The law of New-Jersey which constituted the court, does not relate to the case of appeal, and the act of 18th *December*, 1781, was made to remedy this defect, but that was made *three* years after the sale. In 2 *Roll. Abr.* 233. I. it is said, that if "after sentence, the party appeal, the sentence is *altogether* suspended during the appeal." and *Wood*, in his *Institutes*, p. 525. says, "All acts done after the appeal, in prejudice of the appellant, are to be reversed." In 2 *Browne's Civil Law*, 437. it is said that an appeal *apud acta* may be necessary to prevent the instant intermeddling of the adversary.

The same law is laid down by *Coke*, 4 *Inst.* 340. Sir *Thomas Parker's Rep.* 70. *Foster* v. *Cockburn*, where, upon argument and great deliberation, the court of exchequer decided, that their power to order a sale of the goods seized was suspended by a writ of error, it not being sufficiently proved that they were perishable.

Before trial and condemnation, perishable articles may be sold, but in no other case, unless the power be given by statute law. 2 *Browne's Civil Law*, 227. 229. 446. 450. A special power to sell, notwithstanding an appeal, is given by the British prize acts; but no such power was given to the admiralty court of New-Jersey, either by the law of that state or the act of congress. 2 *Browne's Civil Law*, 231. 454. If the property was in the custody of *Carson*, he was bound by the sentence of restitution. Jennings v. Carson. * 17

As to the question whether the libellant has any remedy against the executors of the owners of the privateer, we say that we claim merely *restitution* in *specie*, or of the value; we claim no damages for the *tort*.

CHASE, J. This is a libel grounded upon the original wrong. The proceedings of the court of admiralty of New-Jersey, and of the continental court of appeals, are brought in only as an exhibit. There is no new relief prayed for.

Lewis. There is a supplemental libel, and the first libel prays for *general relief*. It is the same prayer as in the case of *Penhallow* v. *Doane*. The case in *Cowper*, 74. shows that the remedy extends to executors, where the estate of the testator has been benefited by the *tort*. The case of *Penhallow* v. *Doane* is against the executors of the owner. The libel in the present case was drawn from that precedent.

MARSHALL, Ch. J. The objection is, that the libel does not charge that the property has not been restored; nor that it has not been proceeded against; nor that the sentence of the court of appeals has not been carried into effect.

If these allegations had been made in the bill, and there had been a prayer for general relief, your argument would be pertinent. But the libel complains only of the original tortious capture, and claims damages.

There is no allegation that the property was destroyed, or that a wrongful sale had been made.

LIVINGSTON, J. It is strange that the case of *Penhal-*

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low v. *Doane* should be cited by the appellant. The decision in that case is directly against him. The court there gave relief only for the property which actually came to the hands of the respondents.

* 18 *MARSHALL, Ch. J. observed, that in the case cited from *Cowper*, the property had come to the hands of the executor. The law of that case is not denied by this court.

Lewis. This court is sitting as a court of admiralty proceeding according to the law of nations. No irregularity of form ought to prevent us from obtaining relief according to the case we make out.

As to the question whether the district court of Pennsylvania had cognisance, he observed,

That if the property had been carried first to New-Jersey and then to Pennsylvania, the libel would have been proper in Pennsylvania. So where the libel is against the person, and he is found in Pennsylvania, the libel must be filed there. The only remedy of the libellant is in the courts of the United States, and the federal district court of New-Jersey is as foreign to the state court of New-Jersey, as the federal district court of Pennsylvania.

Carson was bound by the decree of the court of appeals; and courts of admiralty proceeding according to the law of nations will aid each other in the execution of their sentences. Carson died bound by the decree, and his executors are therefore bound. As they lived in Pennsylvania, we could only sue them there.

As to the extent of the relief, he observed, that the sentence was for *restitution;* and as that sentence was passed with the knowledge that a sale had been made, he inferred that the court of appeals did not intend that the proceeds of the sale only should be paid over, but that there should be an actual restitution of the thing itself, or of its actual value. It is no answer to say that such is the usual form of decree in cases where a sale has been made, because those are precedents where the sale has been lawfully made; but here it was unlawful.

Dallas, on the same side.

* 19 *The real question is, who shall bear the loss of the

depreciation of the money; and this depends upon the question in whose possession was the property at the time of the decree of restitution.

The claimant did no act, and was guilty of no omission, which could make that loss fall upon him; but it was a loss produced by the tortious act of the captors, and they are in law answerable for all the consequences.

In England, formerly, all captures were considered as made for the crown. It was only in consequence of the prize acts and proclamations, that the property was adjudged to the captors. But it is now settled that the property vests in the captors immediately upon the capture; 5 *Rob.*(*a*) and the resolves of the old congress take for granted the same principle. By the law of nations the property is changed by the capture, and the owner has no further power over it. The claimant is really and substantially a defendant through all the forms of proceeding, as well in the original suit as in the present. There was no assent, on his part, to the sale; no acquiescence in any act of the court, or of the marshal. The decree of restitution supposes and implies that the property remained in the hands of the captors. The order for sale was made to carry into effect the decree of condemnation, and for the purpose of distribution, not for the preservation of the property, nor to hold it in custody of the law. No security was given by the captors or by the marshal. No public notice was given of the sale; no such notice was required by the order of sale. The sale was made thirteen days after the order was suspended by the appeal, and the captor was the purchaser.

The case was before the court of appeals upon its particular circumstances as well as upon its general merits; and the fact of the sale after the appeal must have been known to the court. Two years had elapsed since the original sentence. A restitution of the thing itself was impossible; and the form of the decree of reversal must have been a matter in question. If the sale had been regularly and lawfully made, the court of appeals would *have taken notice of it, and have decreed restoration of the proceeds of the sale. 3 *Dall.* 102. 115. 119. *Penhallow* v. *Doane.* It was a fact of

* 20

(*a*) The case of the *Elsebe*, 5 *Rob.* 173. seems *contra.*

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which the captor might have availed himself before that court.

But the marshal is to be considered merely as the agent of the captor.

The claimant had no remedy but against the person of the captor. There is no evidence that the proceeds of the sale are anywhere to be found.

The original libel did not ask for process to arrest the vessel, but merely prayed for condemnation. The possession, and the right of possession, were in the captor. There was no process to attach the vessel. The first process was a *monition* and *venire* for the jury. The marshal could have no right to possession, unless by virtue of process of attachment. There is no order in the whole proceedings which takes the possession from the captor. After the appeal the order of sale was a nullity, and the sale by the marshal was as the agent of the captor, who was a trustee for the claimant, and had no right to sell; and is, therefore, liable for all the consequences.

February 11.

MARSHALL, Ch. J. delivered the opinion of the court.

The privateer *Addition*, cruising under a commission granted by the congress of these United States during the war between this country and Great Britain, captured the sloop George, brought her into port and libelled her in the court of admiralty for the state of New-Jersey, where she was condemned as lawful prize by a sentence rendered on the 31st of October, 1778, and ordered to be sold by the marshal. From this sentence Richard D. Jennings, the owner, prayed an appeal, which, on the 23d of December, 1780, came on to be heard before the court of appeals constituted by congress, when the sentence of the court of Jersey was reversed, and restitution of the vessel and cargo was awarded. Pending the appeal, on the 13th of November, 1778, the order of sale *was executed, and the proceeds of sale remained in possession of the marshal. It does not appear that any application was ever made to the court of New-Jersey to have execution of the decree of the court of appeals, and this suit is brought to carry it into execution, or on some other

*21

principle to recover from the estate of Joseph Carson, who was part owner of the privateer Addition, the value of the George and her cargo.

So far as this bill seeks to carry into effect the decree of the 23d of December, 1780, there is no doubt of the jurisdiction of the court; but the relief granted can only be commensurate with that decree. It is, therefore, all essential to the merits of this cause to inquire how far Joseph Carson, the testator of the defendants, was bound by the sentence which this court is asked to carry into effect.

The words under which the plaintiffs claim are those which direct the restoration of the George and her cargo. As the captors are not ordered by name to effect this restoration, and as the order bound those in possession of the subject on which it must be construed to operate, it must be considered as affecting those who could obey it, not those who were not in possession of the thing to be restored, had no power over it, and were, consequently, unable to redeliver it. Had Richard D. Jennings appeared before the court of New-Jersey with this decree in his hand, and demanded its execution, the process of that court would have been directed to those who possessed the thing to be restored, not to those who held no power over it, either in point of fact or law.

This position appears too plain to require the aid of precedent, but if such aid should be looked for, the case of *Doane* v. *Penhallow* unquestionably affords it. In that case a decree of reversal and restitution was satisfied by directing the proceeds of the sales to be paid; and even the judge who tried the cause at the circuit concurred with his brethren in reversing his own judgment, so far as it had decreed joint damages, and had thereby rendered the defendant liable for more than he had received. The case of *Doane* v. *Penhallow*, therefore, which must be considered as expounding the decree *of the court of appeals now under consideration, has decided that Joseph Carson was bound to effect restitution by that decree so far only as he was, either in law or in fact, possessed of the George and her cargo, or of the proceeds.

* 22

To this point, therefore, the inquiries of the court will be directed.

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In prosecuting them it will be necessary to ascertain whether,

1st. The George and her cargo were, previous to the sentence, in the custody of the law, or of the captors.

2d. Whether the court of admiralty, after an appeal from their sentence, possessed the power to sell the vessel and cargo, and to hold the proceeds for the benefit of those having the right.

It appears that the court of New-Jersey, which condemned the George and her cargo as prize, was established in pursuance of the recommendation of congress, and that no legislative act had prescribed its practice, or defined its powers. The act produced in court was passed at a subsequent period, and, consequently, cannot govern the case. But the court cannot admit the correctness of the argument drawn from this act by the counsel for the plaintiffs in error. It cannot be admitted that an act defining the powers and regulating the practice of a pre-existing court, contains provisions altogether new. The reverse of this proposition is generally true. Such an act may rather be expected to be confirmatory of the practice and of the powers really exercised.

Since we find a court instituted and proceeding to act as a court, without a law defining its practice or its powers, we must suppose it to have exercised its powers in such mode as is employed by other courts instituted for the object, and as is consonant to the general principles on which it must act.

That by the practice of courts of admiralty a vessel when libelled is placed under the absolute control of the
*23 *court, is not controverted; but the plaintiffs contend that this power over the subject is not inherent in a court of admiralty, but is given by statute, and in support of this opinion the prize acts of Great Britain have been referred to, which unquestionably contain regulations on this point. But the court is not of opinion that those acts confer entirely new powers on the courts whose practice they regulate. In Browne's Civil and Admiralty Law, in his chapter on the jurisdiction of the prize courts, it is expressly stated that those courts exercised their jurisdiction anterior to the prize acts, and the same opinion is expressed by Lord Mansfield, in the case of *Lindo* v. *Rodney*, which is cited by Browne. The prize acts, therefore, most probably regulated pre-existing powers in the

manner best adapted to the actual circumstances of the time.

It is conceived that the constitution and character of a court of admiralty, and the object it is to effect, will throw much light on this subject.

The proceedings of that court are *in rem*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and the claimant are both actors. They both demand from the court the thing in contest. It would be repugnant to the principles of justice, and to the practice of courts, to leave the thing in possession of either of the parties, without security, while the contest is depending. If the practice of a court of admiralty should not place the thing in the custody of its officers, it would be essential to justice that security should be demanded of the libellant to have it forthcoming to answer the order of the court.

If the captor should fail to libel the captured vessel, it has been truly stated in argument that the owner may claim her in the court of admiralty. How excessively defective would be the practice of that court, if, on receiving such a claim, it neither took possession of the vessel, nor required security that its sentence should be performed. Between the rights of a claimant where a libel is filed and where it is not filed, no distinction is perceived, *and the court conceives the necessary result of * 24
proceedings *in rem* to be, that the thing in litigation must be placed in the custody of the law, and cannot be delivered to either party but on sufficient security.

In conformity with this opinion is the practice of the court of admiralty, not only when sitting for the trial of prizes, and acting in conformity with the directions of positive law, but when sitting as an instance court, and conforming to the original principles of a court of admiralty. In his chapter "on the practice of the instance court," under the title of "proceedings *in rem*," p. 397. Browne states explicitly, that when the proceeding is against a ship, the process commences with a warrant directing the arrest of the ship. In Browne, 405. the course of proceedings against a ship, not for a debt, but to obtain possession, is stated at length, and in that case, too, the court takes possession of the ship.

It must be supposed that a court of admiralty, having

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prize jurisdiction, and, consequently, proceeding *in rem*, and not having its practice precisely regulated by law, would conform to those principles which usually govern courts proceeding *in rem*, and which seem necessarily to belong to the proper exercise of their functions. If in proceeding against a ship to subject her to the payment of a debt, or to acquire the possession of her on account of title, the regular course is, that the court takes the vessel into custody and holds her for the party having right, the conclusion seems irresistible, that in proceeding against a ship to condemn her as prize to the captor, or to restore her to the owner who has been ousted of his possession, the court will also take the vessel into custody, and hold her for the party having the right.

This reasoning is illustrated, and its correctness in a great measure confirmed, by the legislation of the United States, and the judicial proceedings of our own country. By the judicial act the district courts are also courts of admiralty, and no law has regulated their practice. Yet they proceed according to the general rules of the admiralty, and a vessel libelled is always in possession of the law.

*25 *An objection, however, to the application of this reasoning to the case before the court is drawn from the defectiveness of the record in the original cause, which does not exhibit a warrant to the officer to arrest the George. The first step which appears to have been taken by the court is an order to the marshal to summon a jury for the trial of the case.

The carelessness with which the papers of a court created for the purposes of the war, and which ceased to exist before the institution of this suit, have been kept, may perhaps account for this circumstance. At any rate, the court of admiralty must be presumed to have done its duty, and to have been in possession of the thing in contest, if its duty required that possession. The proceedings furnish reasons for considering this as the fact.

The libel does not state the George to have remained in possession of the captors, that the sale was made for them, or by their means, nor that the proceeds came to their hands. The answer of the defendants avers that on bringing the George into port, she was delivered up with all her papers to the court of admiralty, and, although the answer is not testimony in this respect, yet

the nature of the transaction furnishes ample reason to believe that this was the fact; and it is the duty of the plaintiff to show that the defendants are in a situation to be liable to his claim. If the process of the court of admiralty does not appear regular, this court, not sitting to reverse or affirm their judgment, but to carry a decree of reversal and restoration into effect, must suppose the property to be in the hands of those in whom the law places it, unless the contrary appears. The George and her cargo, therefore, must be considered as being in custody of the law, unless the contrary appears.

If this conclusion be right, it follows that the regularity of the sale is a question of no importance to the defendants, since that sale was the act of a court having legal possession of the thing, and acting on its own authority.

*If the reasoning be incorrect, it then becomes necessary to inquire, *26

2. Whether the court of New-Jersey, *after an appeal from its sentence*, possessed the power of selling the George and her cargo, and holding the proceeds for the party having the right.

That the British courts possess this power is admitted, but the plaintiffs contend that it is conferred by statute, and is not incident to a prize court.

That the power exists while the cause is depending in court seems not to be denied, and indeed may be proved by the same authority, and the same train of reasoning, which has already been used to show the right to take possession of the thing whenever proceedings are *in rem*. Browne, in his chapter on the practice of the instance court, shows its regular course to be to decree a sale where the goods are in a perishable condition.

The plaintiffs allege that this power to decree a sale is founded on the possession of the cause, but the court can perceive no ground for such an opinion. It is supported by no principle of analogy, and is repugnant to the reason and nature of the thing.

In cases only where the subject itself is in possession of the court, is the order of sale made. If it be delivered on security to either party, an order of sale pend-

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ing the cause is unheard of in admiralty proceedings. The motive assigned for the order never is that the court is in possession of the cause, but that the property in possession of the court is in a perishable state. A right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use.

If, then, the principle on which the power of the court to order a sale depends, is not that the cause is depending in court, but that perishable property is in its possession, this principle exists in as much force after as before an appeal. The property does not follow the
* 27 appeal into the superior *court. It still remains in custody of the officer of that court in which it was libelled. The case of its preservation is not altered by the appeal. The duty to preserve it is still the same, and it would seem reasonable that the power consequent on that duty would be also retained.

On the principles of reason, therefore, the court is satisfied that the tribunal whose officer retains possession of the thing retains the power of selling it when in a perishing condition, although the cause may be carried by appeal to a superior court. This opinion is not unsupported by authority.

In his chapter on the practice of the instance court, page 405. Browne says, "If the ship or goods are in a state of decay, or of a perishable nature, the court is used, during the pendency of a suit, or sometimes after sentence, notwithstanding an appeal, to issue a commission of appraisement and sale, the money to be lodged with the registrar of the court, *in usum jus habentis.*"

This practice does not appear to be established by statute, but to be incident to the jurisdiction of the court, and to grow out of the principles which form its law. A prize court, not regulated by particular statute, would proceed on the same principles; at least there is the same reason for it.

But there is in this case no distinct order of sale. The order is a part of the sentence from which an appeal was prayed, and is, therefore, said to be suspended with the residue of that sentence.

The proceedings of the court of admiralty, if they are all before this court, were certainly very irregular, and

much of the difficulty of this case arises from that cause; but as this case stands, it would seem entirely unjust to decree the defendant to pay a heavy sum of money, because the court of admiralty has done irregularly that which it had an unquestionable right to do.

Since the court of admiralty possessed the power of making a distinct order of sale immediately after the appeal was entered, and this, but for the depreciation, would have been desirable by all, it is not unreasonable to suppose the practice to have been to consider the appeal as made from the condemnation, and not from the order of sale. The manner in which this appeal was entered affords some countenance to this opinion. In the recital of the matter appealed from, the condemnation alone, not the order of sale, is stated. * 28

The court will not consider this irregularity of the admiralty, in ordering what was within its power, as charging the owners of the privateer, under the decree of the 23d of December, 1780, with the amount of the sales of the George and her cargo, which in point of fact never came to their hands, and over which they never possessed a legal control, for the marshal states himself to hold the net proceeds to the credit of the former owners.

It is, therefore, the unanimous opinion of this court, that the decree of the 23d of December, 1780, does not require that the restoration and redelivery which it orders should be effected by the captors, but by those who in point of law and fact were in possession either of the George and her cargo, or of the money for which they were sold. As the officer of the court of New-Jersey, not the captors, held this possession, the decree operates upon him, not upon them.

On that part of the libel in this case which may be considered as supplemental, and as asking relief in addition to that which was given by the decree of the 23d of December, 1780, the court deems it necessary to make but a very few observations.

The whole argument in favour of this part of the claim is founded on the idea that the captors were wrongdoers, and are responsible for all the loss which has been produced by their *tortious* act. The sentence of reversal and restoration is considered by the plaintiffs as conclusive evidence that they were wrongdoers.

But the court can by no means assent to this princi-

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ple. A belligerent cruiser who with probable cause seizes a neutral and takes her into port for adjudication
*29 and proceeds regularly, is not a wrongdoer. The act is not *tortious*. The order of restoration proves that the property was neutral, not that it was taken without probable cause. Indeed, the decree of the court of appeals is in this respect in favour of the captors, since it does not award damages for the capture and detention, nor give costs in the suit below.

If we pass by the decree, and examine the testimony on which it was founded, we cannot hesitate to admit that there was justifiable cause to seize and libel the vessel.

Upon the whole case, then, the court is unanimously of opinion, that the decree of the circuit court ought to be affirmed.

Sentence affirmed.

RHINELANDER *v.* THE INSURANCE COMPANY OF PENNSYLVANIA.

A capture of a *neutral as prize* by a *belligerent* is a total loss, and entitles the insured to abandon.

The state of the loss *at the time of the offer to abandon*, fixes the rights of the parties.

THIS was a case certified from the circuit court for the district of Pennsylvania, in which the opinions of the judges of that court were opposed to each other upon the question, whether the plaintiff was entitled to recover upon a case stated, the material facts of which were as follow:

The defendants insured 12,500 dollars, on the *freight* of the plaintiff's American ship *The Manhattan*, which had been chartered by *Minturn & Champlin*, for a voyage from *New-York to Batavia, and back to New-York*. The freight was *valued in the policy at* 50,000 *dollars*. The charter-party contained a covenant that if any dispute should arise between the *plaintiff* and *Minturn & Champlin* respecting the freight, the cargo should not be
*30 detained by the *plaintiff*, provided *they* *should give good security to abide by the award of arbitrators, who were to be appointed to settle such dispute. On her home-

ward voyage, on the 10th *of February*, 1805, the ship was taken and detained on the high seas by a British armed vessel, and the second mate and 21 of the seamen taken out, and two British officers and 15 seamen put on board, with orders to take her into a British port. The second mate was put on board another vessel, and arrived in New-York on the 26th of February, when he gave the above information to the plaintiff, who, on the 28th of February, communicated it by his letter of abandonment of that date, to the defendants.

The Manhattan, with her cargo, was carried into Bermuda on the 12th of February, and libelled as prize of war. On the 20th of April, 1805, both vessel and cargo were acquitted. From this sentence, so far as it respected the *cargo only*, an appeal was prayed, which does not appear to have been decided; but on the 8th of May the cargo was delivered to its owners, *on their giving security*, and on the 8th of July the vessel and cargo arrived in New-York; but before their arrival, the defendants having refused to give counter security, so as to relieve the owners of the cargo from the effect of the security which they had given upon getting possession of their goods, the plaintiff, on the 6th of June, 1805, after the vessel was liberated, brought the present suit. Upon the arrival of the vessel and cargo, *Minturn & Champlin* gave security to abide the award of the arbitrators concerning the freight, according to the covenant in the charter-party, and obtained possession of the cargo.

Hopkinson, for the plaintiff, contended,

1. That there had been a total loss of the property insured, occasioned by a peril within the terms of the policy.

2. That the abandonment was made in due time.

*Whenever a vessel is captured by a belligerent *as* * 31
prize, whether the belligerent be a friend or an enemy, the loss is total, so long as the detention exists; and vests a complete right of abandonment. It is not the state of the *information* received, but the actual state of the *fact*, which justifies the abandonment, and gives the right to recover as for a total loss. The vessel was actually libelled as prize at the time of the abandonment, although no information of such libel had been

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received by the plaintiff; and, therefore the case is clearly within the doctrine established by the supreme court of Pennsylvania, in the case of *Dutilgh* v. *Gatliff*, decided a few days ago;(*a*) that if the vessel be libelled

(*a*) Decided January 17th, 1807. The opinion of Ch. J. *Tilghman*, as published in the *United States Gazette*, of the 20th of the same month, is as follows:

On the 24th of September, 1799, the defendant, Samuel Gatliff, underwrote seven hundred and fifty dollars upon a policy of insurance on the schooner Little Will, belonging to John Dutilgh and Thomas Lillibridge, for whom the plaintiff was agent, on a voyage at and from Philadelphia to Havanna.

On the 25th of September, 1799, the Little Will sailed on her voyage from Philadelphia for Havanna, and on the 8th day of October following she was captured by three British privateers, and carried into the port of Nassau, New Providence, where she arrived on the 13th of the same month.

Upon her arrival in Nassau, the said schooner was libelled in the admiralty court, and on the 9th day of November following was regularly acquitted; and in the whole she remained thirty-seven days at Nassau, during thirty-five of which she was in custody of the captors; but the fact of her acquittal was not known to the plaintiff until after the abandonment hereafter mentioned; although it was known to John Dutilgh, one of the owners and supercargo, who was with her at Nassau.

On the 13th day of November, the plaintiff wrote the letter of abandonment, enclosing the papers therein referred to, which was received by the defendant the same day.

On the 20th of November the said schooner sailed from Nassau for Havanna, where she arrived on the 21st of the same month, and sold her cargo, except three boxes plundered at New Providence. Afterwards, the said schooner sailed from Havanna for Philadelphia, where she arrived on the 26th or 27th of February, in the year 1800, with a cargo of sugars, on which freight became due, and was received by Stephen Dutilgh for the benefit of those who were entitled to it; each party refusing to accept her, she was sold for wharfage, and the whole proceeds of sale applied to the payment thereof.

The schooner Little Will was American property, as warranted.

The question for the court is, whether the plaintiff is entitled to recover as for a total loss?

Opinion of the court delivered by W. Tilghman, Ch. J. On the case thus stated, the question submitted to the court is, whether the plaintiff is entitled to recover for a total loss?

In resolving this question, I shall divide it into two points.

1. Did there ever exist a total loss?

2. Supposing that there once existed a total loss, has any circumstance occurred which excludes the plaintiff from recovering for more than a partial loss?

1. The case before us includes one of the risks expressly mentioned in the policy, *a taking at sea*. But it has been objected that this taking was not by an enemy, and that when a belligerent takes a neutral, it is to be presumed that the taking is only for the purpose of

by the *captors as prize, it is such a capture as gives the *insured* a complete right to abandon; and to recover as *for* a total loss. Although the Manhattan and cargo

searching for the property of his enemy, or goods contraband of war, and that in the end, justice will be done to the neutral. To a certain extent there is weight in this distinction; but it must not be carried too far. At the time when the capture in question was made, the United States acknowledged the right of the British to detain their vessels for the purpose of a reasonable search. The bare taking of the vessel, therefore, could by no means constitute a loss; and if under suspicious circumstances she should be carried into port, to afford an opportunity for a complete investigation, perhaps even that ought not of itself to be considered as a total loss. On this, however, I give no opinion. But when the captor, having carried the vessel into port, and completed the examination of the cargo and papers, instead of discharging her, proceeds to libel her as prize, I think the loss is complete. The property is no longer subject to the command of the owner, and it is unreasonable that he should wait the event of judicial proceedings, which may continue for years. The case of an embargo is less strong, because there the confiscation of the property is not intended, and a temporary interruption of the voyage is all that *in general* is to be apprehended. Yet the assured is not obliged to wait the result, but may abandon immediately on receipt of intelligence of the embargo. Not many judicial decisions have been produced on the point in question. Where principles are strong, it is sufficient that there have been no decisions to the contrary. It appears, however, that in the state of New-York, the precise point has been determined. In the case of *Mumford* v. *Church*, decided in the supreme court of New-York, July term, 1799, the assured recovered for a total loss where there was a capture, carrying into port, and libelling by a British captor, although *after the abandonment* the property was restored. It is necessary that some general rule should be established; some line drawn by which the assured may know at what time he has a right to abandon. In most cases the voyage is extremely injured by proceedings in the court of admiralty, and the event is doubtful. For it cannot be denied, that of late such strange occurrences have taken place, in war and politics, as have very much affected the principles and practice of foreign courts of admiralty. Whatever may be said of the law of nature and nations, and the immutable principles of justice, we see very plainly that the courts obey the will of the sovereign power of their country; and this will fluctuates with the circumstances of the times. I am, therefore, of opinion, that both by the words and spirit of a policy of insurance, the assured may abandon when he receives intelligence of the libelling of his vessel.

2. This brings me to the consideration of the second point. Has any circumstance occurred "which limits the plaintiff to a recovery for only a partial loss?"

It is contended that such an event has occurred; that the vessel was acquitted by decree of the court of admiralty; that after acquittal she proceeded on her voyage, and that one of the owners was on the spot, and knew of the acquittal. I do not think there is much weight in the circumstance of one of the owners being on the spot, because the general agent of all the owners was in Philadelphia. This general agent effected the insurance, and conducted all the

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*were acquitted by the viceadmiralty court before the return of the writ in the present case, yet the acquittal, as to the cargo, was suspended by the appeal; and the business with the underwriters, and the owner who was in New Providence gave him intelligence of what occurred from time to time, and by no means intended, from any thing that appears, to restrain him from making an abandonment. It is true that the vessel proceeded on her voyage after she was restored; but it is not stated, nor can the court presume, that any of the owners acted in a manner inconsistent with the abandonment made by their agent. It was proper, at all events, to pursue the voyage for the benefit of whoever might be interested in it. This is the usual practice, and a practice authorized by the policy, and very much for the advantage of the underwriters.

The only difficulty in the case before the court arises from this circumstance; that before the action was brought the vessel was restored, and even at the time of the abandonment there was a decree of acquittal, although restitution does not appear to have been actually made till some days after. The counsel for the defendant have relied much on the opinion of Lord Mansfield in the case of *Hamilton* v. *Mendez*, to establish this principle, that a policy of insurance, being in its nature a contract of indemnity, the plaintiff can recover no more than the amount of his actual loss at the commencement of the action. There is no doubt of the soundness of the principle: I mean that a policy is a contract of indemnity. The only question is, *at what period* the rights of the parties are to be tested by this principle; whether at the time of abandonment or of the commencement of the action. I have considered attentively the case of *Hamilton* v. *Mendez*. It must be obvious to every one, that the decision in that case was perfectly right. It was simply this; that a man shall not be permitted to abandon and recover for a total loss, when he knew at the time of his offer to abandon, that his property which had been lost was restored, and the voyage very little injured. But in reading the opinion of Lord Mansfield, we find a want of accuracy, with which that great man was seldom chargeable. Sometimes it appears as if he thought the period for fixing the rights of the insurers and the insured was the commencement of the suit; sometimes the time of abandonment, and sometimes he even seems to have extended his ideas so far as the time of the verdict. But finally he explicitly declares, that he decides nothing but the point before him. He seems to have felt a little sore at the improper application of some general expressions used by him in the case of *Goss* v. *Withers*. Anxious to cut off all pretence for doing the same in *Hamilton* v. *Mendez*, he has taken too much pains to avoid the possibility of misrepresentation. Hence his argument, considered in the whole, is not altogether clear and consistent. Upon the whole of this case of *Hamilton* v. *Mendez*, I think it most safe to confine its authority to the point actually decided, which was very different from that we are now considering. Some period must be fixed for determining the right of the parties. To limit it to the time of commencing the action would be of little service to the insurers; for the law being once so established, an action would be brought in every instance on the first default of payment. The time of abandonment seems the most natural and convenient period; because the assured must make his election to abandon or not, in a reasonable and short

*property was not, in fact, put into the possession of the freighters, until they had given security to its full value, to return it to the captors in case the sentence of acquittal *should be reversed. As to them, therefore, the property was not *restored*. It never arrived *in safety*. Its trial was still pending, and if it should finally be condemned, the freighters would never be liable to the plaintiff for the freight. As to the plaintiff, therefore, it still continues a total loss of the freight. He cannot, in any event, recover it from the freighters until the appeal is decided, and if that decision should be against the latter, his only chance would be in the hope of justice from the courts of the captors, who, upon condemnation of the cargo, sometimes order the freight to be paid to the owner of the ship, if he is a fair neutral, and has no interest in the cargo. Nothing but relieving the freighters from the security they had given for the cargo, could entitle the plaintiff to recover against *them*. The underwriters, therefore, were bound either to pay to the plaintiff the amount they had insured, or, by giving such counter security as should indemnify the freighters, give the plaintiff a right of ac- *35

time after he hears of the loss, and the property being transferred by the abandonment, can never afterwards be claimed by the assured. Want of mutuality is want of justice. There is no reason why the assured should be bound, but the assurer left free to take advantage of events subsequent to the abandonment.

It has been contended by the plaintiff's counsel that the right to abandon would not have been affected, even if the property had been restored at the time of the abandonment, because the restitution was unknown to the plaintiff. As to this, I give no opinion. It is unnecessary; because it is stated that the vessel remained in the *custody* of the *captors*, at the time of the abandonment. The defendants' counsel have urged that this was the fault of the captain, or of one of the owners, who was then at New Providence, because, after a decree of acquittal, a writ of restitution might have been sued out. But it not being stated that there was any fault or negligence in the captain or owner, I do not think that the court can infer it; it being stated that the vessel remained in the custody of the captors, we must presume that the custody was legal. Whether for the purpose of giving the captors an opportunity of entering an appeal, or for what purpose it was the restitution was delayed, we are at a loss to determine. But as restitution was not actually made, and as the plaintiff was ignorant even of the decree of acquittal, his right to abandon remained unimpaired.

Upon the whole, I am of opinion that the *plaintiff is entitled to recover for a total loss*.

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tion against *them*. The latter part of the alternative the defendants have refused. The case of *Da Costa* v. *Newnham*, 2 *T. R.* 407. shows that the underwriters were bound to give such counter security, or to pay the amount insured. The property never came free into the hands of the freighters. The right of action depends upon the facts existing at the time of abandonment. In the case of *Mumford* v. *Church*, decided by the supreme court of New-York, at July term, 1799, the assured recovered notwithstanding a restoration *before abandonment*. But the assured cannot retract his abandonment, and it is not just that one party should be bound, and the other at liberty. If the plaintiff had a right to abandon, the defendants were bound to accept.

For the defendants, *Rawle* and *Lewis* contended,

1. That there never was a total loss; and, consequently, the plaintiff never had a right to abandon.

* 36 *2. That before the action was brought, the vessel was acquitted, and therefore no right of action existed.

3. That before the return of the writ, the vessel and cargo had arrived in safety at the port of destination, and the freight was earned, and that the plaintiff might recover it from the freighters.

4. That the plaintiff had voluntarily suffered the cargo to be delivered without payment of the freight, and had lost his lien on the goods by his own folly, and, therefore, had no right to recover from the underwriters.

They admitted that the defendants were liable for a partial loss to the amount of the charges, expenses, &c. in consequence of the capture; but denied that the plaintiff could claim for a total loss. The information received at the time of the offer to abandon was only of an arrest and detention; which, as the Manhattan was a neutral vessel, must be presumed to be only for the purpose of exercising the belligerent right of search; and such a detention has never been holden to give a right to abandon. But a capture *by a friend* differs from a capture *by an enemy*. *Park*, 66. It is presumed that the courts of our friend will do us justice, and restore our property without delay. Hence no salvage is

allowed for the recapture of a neutral from the power of one of the belligerents, unless under very particular circumstances. If the capture of a neutral be not followed by condemnation, it is not a total loss, unless the voyage be wholly broken up. *Park*, 79. *Saloucci* v. *Johnson*. The right of *search* (admitted by our treaty) gives a right to send the neutral into port for examination, and for that purpose the belligerent may put a force on board, and take out part of the original crew. The mere capture, ordering her into port, taking out part of the crew and putting other men on board, gave no right to abandon, and yet the abandonment is founded upon those facts only. The defendants were not obliged to accept the abandonment. It ought to have been accompanied by a cession. No subsequent event can make it valid. It was not accepted, and, therefore, *did not bind either party. The information ought to be such at the time of abandonment, that the underwriter may know whether he ought to accept it or not. He should be able to decide whether he ought to undertake the defence of the property. The insured cannot abandon, unless upon information of facts which show a total loss. Subsequent events cannot be coupled with a prior offer to abandon. Suppose the insured should say, I heard of a gale of wind; I offer to abandon, although I have heard of no loss; could that avail him? In the case of *Suydam & Wyckoff* v. *The Marine Insurance Company*, 1 *Johns.* 181. the supreme court of the state of New-York decided that the insured cannot avail himself of a subsequent event, without a new abandonment. It is admitted that the facts, and not the information, decide the right to abandon, but there must be information of sufficient facts at the time of abandonment. A detention for examination does not necessarily destroy the voyage, or even render it probable that the voyage will be broken up. Whenever the *fact* appears that the voyage is destroyed, and the jury finds the fact to be so, (for it is not a matter of law,) it is a total loss. There is no printed report of the case of *Mumford* v. *Church*, and, therefore, we cannot examine its principles.(*a*)

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(*a*) LIVINGSTON, J. That case was reversed, in principle, by the court of errors, in *Timberly* v. *Church*. And the law now established by that case in New-York is, that *if, at the time of abandonment, the property has been actually restored, the abandonment is invalid.*

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But the restitution of the cargo, although on security, is a legal restitution. The freight never was in danger. If it has been, it was in consequence of facts which would have discharged the underwriters. If the voyage was lawful, freight would have been allowed, even upon enemies' goods, and although the voyage was not ended. Whether the cargo be condemned or not, the shipowner is entitled to his freight. The only ground upon which a British court of admiralty will refuse to allow freight, is a ground which would also discharge the underwriters, viz. that the shipowner was not a fair neutral. 1 *Rob.* 245. (*Amer.* ed.) *The Copenhagen.* 2 *Rob.* 84. *The Rebecca.* 3 *Rob.* 88. *The* *38 **Racehorse.* 3 *Rob.* 245. *The Atlas.* 4 *Rob.* 279. 282. *The Vrow Henrica.* 3 *Bos. & Pull.* 291. *Touteng* v. *Hubbard.* It is only a delay in receiving the freight. If the plaintiff is to be considered as a fair neutral shipowner, he must eventually recover the freight, either from the owners of the cargo, or the captors; and if he is not such a fair neutral shipowner, the warranty in the policy is falsified, and the defendants are not liable. Suppose the delay had been caused by any of the other perils insured against, such as a violent storm driving the ship off from the coast, or a long course of contrary winds, &c. the inconvenience to the plaintiff would have been the same, and yet he would have no right to abandon. The defendants did not undertake that the voyage should be performed in any given time, nor to be liable for the wear and tear of the ship, tackle, &c. in consequence of such protracted voyage. The defendants have a right to avail themselves, in their defence, of the very evidence produced on the trial of the libel, and even of the sentence of condemnation, if it proceed upon grounds inconsistent with the warranty. The defendants were not bound to give the counter security; because the plaintiff's vessel had been restored to him without security; and it cannot be right that the defendants, who are not underwriters upon the cargo, should give security to its whole amount, in order to enable the plaintiff to recover the freight from the freighters.

But the freight was earned, and the freighters were liable to the plaintiff before the defendants were bound

to plead. The vessel and cargo had arrived, and the defendants may now set up that fact as a defence.

If a vessel, supposed to be lost, be abandoned to the underwriters, and a suit brought upon the policy, but before plea pleaded, the vessel arrive in safety; the underwriters may plead this fact, or give it in evidence, and it will be a good defence. In *Hamilton* v. *Mendez*, 2 *Burr.* 1214. Lord Mansfield says, "We give no opinion how it would be in case the ship or goods be restored in safety," "between the *commencement* of the action and the verdict." And in *Sullivan* v. *Montague*, *Doug.* 112. he says, "*actio non* goes, in every case, to *the *time of pleading*, not to the commencement of the action." The declaration is the beginning of the action. *Co. Litt.* 126. a. And even after plea pleaded, if any matter of defence arise, the defendant may, and indeed if he would not for ever lose the benefit of it, he must, plead it as a plea *puis darrein continuance*. *Yelv.* 141. *Ewer* v. *Moile*.

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But the plaintiff has never made a cession to the underwriters of his right to the freight, and of the means of obtaining it. He had, by a covenant in the charter-party, given up his *lien* upon the cargo; a fact unknown to the defendants, and which ought to have been disclosed. He had also, without the defendants' consent, left the question of freight to arbitrators, who have not yet decided.

Ingersoll, in reply.

The question whether the cargo shall be restored to its owners, is still pending in the court of admiralty, and if the plaintiff had, at any time, a right to recover the freight from the underwriters, that right still continues. On the first intelligence of the capture, the plaintiff offered to abandon; and, according to the true state of the facts, he had then a complete right to abandon. Although the property was neutral, yet it was captured *as prize*. It was treated by the captors as enemy-property. It was, in fact, taken *jure belli*, and, therefore, it can make no difference, *in principle*, whether the nation of the captors be at peace or at war with the nation of the captured vessel and cargo. It was seized as *prize of war*, and the question of neutrality is still to be decided. The delivery of posses-

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sion, *upon security*, is no more a restitution of the cargo, than if the owners had purchased it under a decree of condemnation. It has not arrived *safe;* it is burdened with an encumbrance to its full value. The circumstances detailed by the second mate, in his first information to the plaintiff, clearly showed that the seizure was made of the property as *prize of war*. It is said the abandonment was made too soon. In *Fuller* v. *M'Call*, 2 *Dall.* 219. the plaintiff was holden to be too late, because he did not abandon upon receipt of the first intelligence, although the information came
*40 from a *stranger. But here the information was given by an officer of the ship, an eye witness, and the vessel was, in fact, libelled as prize of war. The insured is bound to abandon in a reasonable time after receiving the intelligence, so that the underwriter may take measures to save what he can to indemnify himself; and no objection can be made that the insured abandoned too soon, if subsequent information prove that he had then a right to abandon.

Whether this be strictly a *capture* or not, is immaterial, as one of the risks insured against is *taking at sea;* and as this taking was with the view of seizure as prize, on suspicion of its being enemy-property, it is within the principle of belligerent capture. The right of search gives no right to dispossess the owner of his vessel, either according to the law of nations, or to our treaty with Great Britain. But if such right did exist, an unreasonable detention gives a right to abandon; and whenever a vessel is libelled, if the insured means to claim for a total loss, he ought to abandon, in order to give the underwriters a right to defend the property in the court of admiralty. The insured, after an offer to abandon, is not bound to defend the property. The libel was filed eight days before the abandonment, but that fact was not necessary to give the right to abandon.

It has been said that the books furnish no case in which the capture by a friend has been decided to be a total loss. But *Marshall*, in p. 422. and 435. considers the law as settled, that a capture by a friend, under pretence of enemy's goods, must be considered as a capture, because it is done *as an act of hostility*. The uncertainty of the duration of the detention, puts it

upon the same principle as the case of an embargo. A capture is a total loss, although a condemnation never takes place. 2 *Burr.* 694. 697. *Goss* v. *Withers.*

An actual deed of cession was not necessary, because the offer to abandon was not absolutely accepted. The offer to cede the plaintiff's right was sufficient. The covenant in the charter-party to relinquish the lien on the cargo for freight, upon other security being given, did not affect the interests of the underwriters. The *security* stood in the place of the *cargo*, and was abundantly sufficient.

*MARSHALL, Ch. J. delivered the opinion of the court, as follows: *41

The Manhattan, a neutral ship, while prosecuting the voyage insured, was captured by a belligerent cruiser, the second mate and twenty-one of the hands were taken out, and two British officers and fifteen seamen *put* on board, and she was ordered into a British port. The mate soon afterwards arrived in the United States in another vessel. On the 26th of February, 1805, he gave information of these facts to the owner of the Manhattan, who, on the 28th of the same month, communicated it to the insurers, and offered to abandon to them. On the 2d of April payment of the freight was demanded and refused. The Manhattan was carried into Bermuda, and libelled as prize of war. On the 20th of April in the same year, both vessel and cargo were acquitted. From this sentence, so far as respected the cargo only, an appeal was prayed, which does not appear to have been decided. The cargo was delivered to the owners on their giving security, and on the 8th of July the vessel and cargo arrived at the port of destination. The underwriters having refused to give counter security, this action was brought on the 6th of June, after the vessel was liberated, and before her arrival at the port of destination. The policy is on the freight.

The question referred to this court is, whether the facts stated entitle the insured to recover against the underwriters for a total loss.

In examining this question, the material points to be determined are,

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1st. Had the insured a right to abandon when the offer was made?

2d. Have any circumstances since occurred which affect this right?

These are important questions to the commercial interest of the United States, and ought to be settled with as much clearness as the case admits.

*42 *It is universally agreed, that to constitute a right to abandon, there must have existed a total loss, occasioned by one of the perils insured against; but this total loss may be *real*, or *legal*. Where the loss is *real*, a controversy can only respect the fact; but the circumstances which constitute a legal, or technical loss, yet remain, in many cases, open for consideration.

It has been decided that a capture, by one belligerent from another, constitutes, in the technical sense of the word, a total loss, and gives an immediate right to the insured to abandon to the insurers, although the vessel may afterwards be recaptured and restored.

It has also been decided that an embargo or detention by a foreign friendly power, constitutes a total loss, and warrants an immediate abandonment. But the capture, or taking at sea of a neutral vessel by a belligerent, is a case on which the courts of England do not appear to have expressly decided, and which must depend on general principles, on analogy, and on a reasonable construction of the contract between the parties.

A capture by an enemy is a total loss, although the property be not changed, because the *taking* is with an intent to deprive the owner of it, and because the hope of recovery is too small, and too remote to suspend the right of the insured, in expectation of that event.

If a neutral ship be captured as enemy-property, the taking is unquestionably with a design to deprive the owner of it; and the hope of recovery is in many cases remote, since it may often depend on an appellate court; and though not equally improbable as in the case of capture by an enemy, is not so certain as is stated in argument by the counsel for the defendants.

The distinction between a capture by an enemy and by a belligerent not an enemy, has not been taken in the cases adjudged in England, so far as those cases have

been laid before the court, and the best general writers seem to arrange them in the same class. 2 *Marshall*, 422. 435.

*It has been also determined, that a total loss existed in the case of an embargo, or the detention of a foreign prince. *43

In one case cited at the bar, (*Saloucci* v. *Johnson*,) the court of king's bench determined that an illegal arrest at sea amounted to a detention by a foreign prince, and although that case has since been overruled in England, so far as it decided that to resist a search did not justify a seizure, yet the principle that an arrest at sea was to be resolved into a detention by a foreign power, has not been denied. *Marshall*, (435.) after noticing the contrary decisions respecting the right of a neutral to resist a search, adds "yet the above case of *Saloucci* v. *Johnson* may nevertheless, I conceive, be considered as an authority to prove, that if a neutral ship be *unlawfully* arrested and detained by a belligerent cruiser, for any pretended offence against the law of nations, this would be a detention of princes."

That a detention of a foreign power by embargo, or otherwise, warrants an abandonment, is well settled. 2 *Marshall*, 483.

The opinion given by the court of king's bench in the case of *Saloucci* v. *Johnson*, goes no further than to establish that an *unlawful* arrest at sea is to be considered as the detention of a foreign prince. Whether the arrest can only be considered as *unlawful* when the cause alleged, if true, is not in itself sufficient to justify a seizure, or when, if true, it would be sufficient, but is in reality contrary to the fact, is not stated. In point of reason, however, it would seem that when an arrest is made at sea by a person acting under the authority of a prince, the detention is as much the detention of princes in the one case as in the other.

In the case of an embargo, the detention is lawful. The right of any power to lay an embargo has not been questioned. Yet it is universally admitted, that an embargo constitutes a detention which amounts, at the time, to a total loss, and warrants an abandonment.

*In what consists the difference between a detention occasioned by an embargo, and a detention occasioned by an arrest at sea of a neutral by a belligerent power? *44

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An embargo is not laid with a view to deprive the owner of his property, but the arrest is made with that view. In the first case, therefore, the property detained is not in hazard; in the last, it always is in hazard. So far the claim to abandon on an arrest is supported by stronger reason than the claim to abandon when detained by an embargo.

But it is argued that the duration of an embargo has no definite limitation, while a neutral vessel may count on being instantly discharged. Such is the rapidity of proceeding in a court of admiralty, that its mandate of restoration is figuratively said to be "borne on the wings of the wind."

Commercial contracts have but little connection with figurative language, and are seldom rightly expounded by a course of artificial reasoning. Merchants generally regard the fact itself; and if the fact be attended to, an embargo seldom continues as long as the trial of a prize cause, where an appeal is interposed. The history of modern Europe, it is believed, does not furnish an instance of an embargo of equal duration with the question whether the cargo of the Manhattan be or be not lawful prize. The reasoning of the books in the case of a capture by an enemy, and of an embargo, applies in terms, but certainly in reason, to an arrest by a belligerent, not an enemy. 2 *Marshall*, 483.

The reasoning of the English judges in all the cases which have been read at bar, and their decisions on the question of abandonment, have received the attention of the court. To go through those cases would protract this opinion to a length unnecessarily tedious. With respect to them, therefore, it will only be observed, that the principles laid down appear to be applicable to an arrest as well as to a capture, or detention of foreign powers; and that a distinction between an arrest and such capture or detention, has never been taken.

* 45 *The contract of insurance is said to be a contract of indemnity, and, therefore, (it is urged by the underwriters, and has been repeatedly urged by them,) the assured can only recover according to the damage he has sustained. This is true, and has uniformly been admitted. But if full compensation could only be demanded where there was an actual total loss, an abandonment could only take place where there was nothing to abandon.

There are situations in which the delay of the voyage, the deprivation of the right to conduct it, produce inconveniences to the insured, for the calculation of which the law affords, and can afford, no standard. In such cases there is, for the time, a total loss: and in this state of things the insured may abandon to the underwriter, who stands in his place, and to whom justice is done, by enabling him to receive all that the insured might receive. A capture by an enemy, and an embargo by a foreign power, are admitted to be within this rule, and a complete arrest by a belligerent not an enemy, seems, in reason, to be equally within it.

It is, therefore, the unanimous opinion of the court, that where, as in this case, there is a complete taking at sea by a belligerent, who has taken full possession of the vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, *a total loss*, and the act of abandonment vests the right to the thing abandoned in the underwriters, and the amount of insurance in the assured.

2. Have any circumstances occurred since the abandonment, which have converted this total into a partial loss?

Without reviewing the conduct of the assured subsequent to that period, it will be sufficient to observe that he has performed no act which can be construed into a relinquishment of the right which was vested in him by the offer to abandon.

It only remains, then, to inquire whether the release and return of the Manhattan deprives the assured of *the right to resort to the underwriters for a total loss, which was given by the abandonment. * 46

This point has never been decided in the courts of England.

In the case of *Hamilton* v. *Mendez*, Lord Mansfield leaves it completely undetermined, whether the state of loss at the time the abandonment is made, or at the time of action brought, or at the time of the verdict rendered, shall fix the right to recover for a partial or a total loss.

A majority of the judges are of opinion that the state of loss *at the time of the abandonment* must fix the rights of the parties to recover on an action afterwards brought; and the judge who doubts respecting it, is of opinion that,

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in this case, counter security having been refused by the underwriters, the question of freight is yet suspended.

It is to be certified to the circuit court of Pennsylvania, that in the case stated for the opinion of this court, the plaintiff is entitled to recover for a total loss.

MONTALET *v.* MURRAY. (a)

When *both* parties are *aliens*, the courts of the United States have not jurisdiction.

ERROR to the circuit court for the district of Georgia.

The action was brought in the court below by *Murray, a citizen of the state of New-York*, against *Montalet, an alien, and citizen of the French republic*, upon sundry promissory notes, made by the defendant at *St. Domingo*, *47 payable to the order of Monsieur *Caradeaux de la Caye*, whose residence, or citizenship, or national character, does not appear in the declaration.

If it does not *appear* upon the *record* that a suit might have been maintained in the courts of the United States between the *original* parties to a promissory note, no suit can be maintained upon it in those courts by any subsequent holder.

It was suggested that it did not appear by the record that a suit could have been prosecuted in that court to recover the contents of those notes if no assignment had been made, and therefore the court could not take cognisance of the present case, being prohibited by the *act of congress*, vol. 1. p. 55. s. 11.

P. B. Key, for the defendant in error, stated that it appeared in the plea that the payee of the note was also an *alien, and subject of France*. 4 *Dall.* 8. *Turner* v. *The Bank of North America.*

Costs are not given upon reversal of judgment.

The Court was unanimously of opinion that *the courts of the United States have no jurisdiction of cases between aliens.*

Key then suggested that perhaps it did not sufficiently appear upon the record that the original parties to the notes were aliens;

(a) Present, *Marshall*, Chief Justice, *Washington*, *Johnson* and *Livingston*, Justices.

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But MARSHALL, Ch. J. said, that if it did not appear upon the record that the character of the original parties would support the jurisdiction, that objection was equally fatal, under the uniform decisions of this court.

Judgment reversed for want of jurisdiction, and with costs, under the authority of *Winchester* v. *Jackson*, at last term. *Ante*, vol. 3. p. 514.

But on the last day of the term, *The Court* gave the following general directions to the clerk.

That in cases of *reversal*, costs do not go of course, but in all cases of *affirmance* they do. And that when a judgment is reversed for want of jurisdiction, it must be *without costs*.

*THE UNITED STATES *v.* WILLINGS AND FRANCIS. *48

An American registered vessel, in part transferred by parol while at sea to an American citizen, and resold to her original owners on her return into port, before her entry, does *not* by that operation, lose her privileges as an American bottom, nor become subject to foreign duties.

THIS was an action of debt brought originally in the district court of the United States for the district of Pennsylvania, for the penalty of a bond dated November 16th, 1802, conditioned to pay to the collector of the customs, "the sum of 7,720 dollars and 41 cents, OR the amount of the duties *to be* ascertained as due and arising on certain goods," &c. "entered by the above bounden Willings & Francis, as imported in the ship *Missouri*, from Canton, as per entry, dated 16th November, 1802."

The pleadings which ended in a *general demurrer* to the *surrejoinder*, brought into view the question, whether the ship *Missouri*, at the time of her arrival and entry from Canton, was entitled to the privileges of a registered ship of the United States; for if she was, the sum mentioned in the condition of the bond (which had been calculated as if she had been a foreign bottom) was too large by the sum of 702 dollars and 5 cents.

The facts upon which this question arose, appear, by the record, to be as follows.

The ship *Missouri*, when she sailed from Philadelphia for Canton, was a duly registered ship of the Uni-

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ted States, owned wholly by Willings & Francis, citizens of the United States. While at sea, and while the register of the ship was on board in possession of the master, she was in part sold by Willings & Francis, in Philadelphia, to *J. G. Koch* and others, citizens of the United States, on the 12th of February, 1801, but was not then registered anew by her former name, nor was there an instrument in writing, in the nature of a bill of sale, reciting at length the certificate of registry. On the 15th of November, 1802, *after* the arrival of the ship at Philadelphia, and *before any report or entry*, *Koch and others*, the vendees, made a *parol* resale of their part of the ship to *Willings & Francis*, whereby the whole was revested in them. Afterwards, on the same 15th of November, (it being the day of her arrival,) the register *was delivered up by the master of the ship to the collector of the port of Philadelphia, and the vessel duly reported and entered; and *T. W. Francis*, one of the part owners, resident at that port, upon the entry of the ship, offered to make oath that the register contained the names of all the persons who were then owners of the ship; that since the granting of the register the ship had been in part sold by Willings & Francis to *Koch and others*, who had resold the same to Willings & Francis, and that no foreigner had any share or interest in the ship. On the 22d of December, 1802, Willings & Francis made a bill of sale to *Koch and others*, reciting the register at length in due form of law, whereupon the ship was registered anew by her former name as the property of *Willings & Francis, and Koch and others, as joint owners.* On the 7th of January, 1803, *Koch and others*, by a bill of sale reciting the register at length, in due form of law, resold and reconveyed their part of the ship to Willings & Francis; whereupon the register was delivered up, and the ship registered anew by her former name, as the property of Willings & Francis.

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By the 14th section of the act of congress of 31st *December*, 1792, vol. 2. p. 146, 147. it is enacted,

"That *when* any ship or vessel which shall have been registered pursuant to this act, or the act hereby in part repealed, *shall* in whole or in part be sold or transferred to a citizen, or citizens of the United States, or shall be altered in form or burden," &c. "*in every such case*

the said ship or vessel *shall* be registered anew, by her former name, according to the directions herein before contained, (otherwise she *shall* cease to be deemed a ship or vessel of the United States,) and *her former certificate of registry shall be delivered up* to the collector, to whom *application* for such new registry shall be made, *at the time that the same shall be made.*"

"And *in every such case* of sale or transfer, there *shall* be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate; otherwise the said ship or vessel *shall be* incapable of being so registered anew. *And in every case* in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel *of the United States. And further, if her * 50
said former certificate of registry shall not be delivered up as aforesaid, except the same may have been lost," &c. "the owner or owners of such ship or vessel shall forfeit and pay the sum of five hundred dollars, to be recovered with costs of suit."

And by the 17th section it is enacted,

"That *upon the entry* of every ship or vessel of the United States from any foreign port or place, if the same shall be at the port or place at which the owner or any of the part owners reside, such owner or part owners shall make oath or affirmation that the register of such ship or vessel contains the name or names of all the persons who are then owners of the said ship or vessel; or if any part of such ship or vessel has been sold or transferred since the granting of such register, that such is the case, and that no foreign subject or citizen hath, to the best of his knowledge and belief, any share, by way of trust, confidence, or otherwise, in such ship or vessel."

"And if the owner," &c. "shall refuse to swear or affirm as aforesaid, such ship or vessel shall not be entitled to the privileges of a ship or vessel of the United States."

The judgment of the *district court*, upon the demurrer, was in favour of the United States, but it was reversed upon a writ of error in the *circuit court*, and the United States brought the case up, by writ of error, to this court.

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Rodney, (Attorney-General,) for the plaintiffs in error, Cited 4 *Dall.* 28. *Priestman* v. *United States*, and 1 *Bos. & Pull.* 263. 267. to show the great degree of strictness with which the revenue laws had been construed, both in this country and England.

He contended that the word "*when*," (in the 14th section of the act,) means *at that time*, viz. *when* the ship shall be sold, she shall be registered anew. She was sold on the 12th of February, 1801, and ought *then* to have been registered anew, but was not. The consequence, according *to the act, is, that from that time she ceased to be deemed a ship or vessel of the United States.

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The want of a new register did not annul the sale; nor was it vacated by the want of an instrument of writing in the nature of a bill of sale, reciting at length the certificate of registry. But the want of such an instrument was a bar to the obtaining a new register, and a sale without a new register causes a forfeiture of all her privileges as a ship or vessel of the United States.

The impossibility of delivering up the old register while it was at sea, so as to obtain a new register, is no excuse for the defendant's neglect to comply with that part of the act which requires an instrument in writing, in the nature of a bill of sale, which shall recite at length the certificate of the registry; because the registry is a matter of record, and a copy might have been had to insert in the bill of sale. 3 *T. R.* 406. *Rolston* v. *Hibbert*.

Lewis, contra.

The letter and the spirit of the act are in favour of the defendants. It is a general rule of law that every act which creates a penalty or forfeiture, is to be construed strictly against the United States.

The forfeiture of the privileges of a ship of the United States is a very heavy penalty, and although this penalty is inserted in a revenue law, yet that can make no difference in the rule of construction.

The construction contended for by the United States would put it in the power of the owner of the *vessel* to subject the owner of the *goods* to this penalty without any fault of his own. This could not have been

the intention of the legislature in the case of a sale from one citizen of the United States to another, when they have taken care in the 16th section to provide, that where there are several citizens of the United States part owners of a vessel, and one of them sells his share to *an alien*, it shall not forfeit the shares of the other citizens of the United States, who were ignorant of such transfer.

*The act for registering vessels was intended to protect American shipowners, and American navigation, by giving them exclusive privileges. The true construction, therefore, of the act must be that which will best carry the intention into effect. But if the opposite construction prevail, no person will dare to freight the vessel, or to become a part owner, lest he subject himself to the caprice of the other owners, and after calculating the probable event of his adventure upon the expectation of paying only domestic duties, he find himself defeated by an unforeseen imposition of *foreign* duties, to the utter ruin of his enterprise. * 52

But the great question is, *when* is she to be registered anew? The words of the act are, "That when any ship" "shall be sold," "*in every such case* the said ship" "shall be registered anew," "*and her former certificate of registry shall be delivered up* to the collector, *to whom application* for such new registry shall be made, *at the time* that the same shall be made." "And *in every such case* of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew." "*And in every case* in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States."

The whole tenor of this section shows that she is not to be registered anew *until her return.* The law requires that the register should be on board the ship while at sea, and no new register can be granted until the old one is delivered up, which cannot be until the vessel returns to port. The only effect of the want of a bill of sale in writing is to prevent the issuing of a

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new register; until, therefore, a new register can be applied for, and the old register given up, no bill of sale in writing is necessary.

The only use of a bill of sale in writing, and of the oath required by the 17th section, is to ascertain, at the time of entry, whether any foreigners are interested, so *as to give the exclusive privileges to American citizens only. While the vessel is at sea there is no use in giving new evidence of her American character. It is only at her return and entry that it becomes necessary to discriminate.

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A bill of sale in writing is necessary, but is not of itself sufficient to obtain a new register. It must also be accompanied by an actual delivering up of the old register; and until the latter can be done, the former is useless.

The law did not intend to prevent the sale of a vessel at sea, and as the transfer cannot be complete until her return, it is not necessary that even the bill of sale in writing should be made until her return. Indeed, the act, by requiring that the certificate of registry should be recited at length in the bill of sale, and by requiring also that the certificate itself should remain on board the vessel while at sea, strongly implies that the bill of sale in writing can be made only while the vessel is in port. Both the sale and resale by parol, are admitted by the pleadings to be valid and effectual in passing and repassing the property, so that Willings & Francis, at the time of the entry of the ship, could safely take the oath required by the 17th section; and it is evident that that oath contains an averment of all the facts necessary to entitle the ship to the privileges of a vessel of the United States, at the time of entry, if she had been before duly registered as such. This is apparent by comparing the 17th section with the 1st, which declares that vessels registered pursuant to the act shall be entitled to the privileges of vessels of the United States, so long as they shall continue to be wholly owned and commanded by citizens of the United States.

The oath in the 17th section is, that the register contains the names of all the persons who are then owners of the ship; *or*, if any part has been sold or transferred since the granting the register, that such is the case;

and that no foreign subject or citizen *hath*, to the best of his knowledge and belief, any share, by way of trust, confidence, or otherwise, in such ship or vessel. And the section provides, that if the owner shall refuse to take *such oath, the vessel shall not be entitled to the privileges of a vessel of the United States, which strongly implies, that if the owner does not refuse, but offers (as in the present case) to take the oath, the vessel *shall* be entitled to those privileges. United States v. Willings. *54

Again, the oath in the 17th section shows that the owner is not bound to give notice of the sale, till the vessel has arrived and is about to be entered.

The whole argument on the part of the United States is built upon a particular construction, or meaning, applied to the word "*when*," in the beginning of the 14th section. It is said that "when" means *at that time*. But this is not the only meaning of the word. It is often used for *if*, or *in case*. And in this sense it is used in that section; and in the same sentence the idea intended to be expressed by the word "*when*" is repeated and explained by the expression "*in every such case*." The words are not "*when* any ship shall be sold," "she shall be registered anew;" but, "when any ship shall be sold," "*in every such case*" "she shall be registered anew," thereby excluding the idea that the registering anew was to be at the moment of sale, and negativing the construction which might otherwise be raised upon the equivocal meaning of the word "*when*."

The 7th section of the act provides, that if the vessel shall be transferred while *at sea*, the master shall, *within eight days after his arrival* within any district of the United States, deliver up the certificate of registry to the collector of such district; and the 14th section shows that no new register can be had until the old one is delivered up. By the 11th section, if the vessel shall arrive in a district other than that in which the new owner usually resides, she may obtain a temporary register, which shall be given up on her arrival at the port to which she belongs. By no clause of the act is it required that notice of sale should be given to any officer of government, until the vessel arrives in port, and is about to be entered at the custom-house.

The words of the 14th section are in the future tense.

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If she shall not be registered anew, she *shall* cease to be deemed a ship or vessel of the United States.

*The whole tenor and spirit of the act show that none of the forms are to be complied with while the vessel is at sea.

*55

February 14.

MARSHALL, Ch. J. delivered the opinion of the court.(a)

The single question in this case is, whether an American registered vessel, in part transferred by parol while at sea to an American citizen, and resold to the original owners on her return into port, before her entry, does by that operation lose her privileges as an American bottom, and become subject to foreign duties.

This question depends on the "Act concerning the registering and recording of ships and vessels," and more particularly on the 14th and 17th sections of that act.

In construing the 14th section, much depends on the true legislative meaning of the word "when." The plaintiffs in error contend that it designates the precise time when a particular act must be performed in order to save a forfeiture; the defendants insist that it describes the occurrence which shall render that particular act necessary. That the term may be used, and, either in law or in common parlance, is frequently used, in the one or the other of these senses, cannot be controverted; and, of course, the context must decide in which sense it is used in the law under consideration.

The particular act to be performed in order to save the forfeiture of the American character, and the privileges attached to it, is the obtaining a new register; and the first inquiry is, whether this new register must be obtained at the time of transfer, or at some other convenient time on the event of a transfer.

This would seem to the court scarcely to admit of a doubt. It has been correctly argued that the precise *time to register the vessel anew cannot be prescribed by the word "when," because the direction does not follow that word in the sentence so as to be limited by it with respect to time. It is not said that when a registered vessel shall be transferred or altered, she shall ob-

*56

(a) Present, *Marshall*, Chief Justice; *Washington*, *Johnson* and *Livingston*, Justices.

tain a new register or cease to be an American vessel, but the continuity of the sentence is broken by interposing the words " in every such case," thereby clearly making the forfeiture to depend on the failure to register on the event described, not on the failure to register at the precise time when the event described occurs.

This observation also applies to a subsequent part of the section, where the forfeiture is repeated, and depends on the failure to register, not on the failure to register at the precise time of transfer.

But this construction, which is the fair and natural exposition of the words themselves, is rendered still more obviously necessary by the nature of the case, and by the context.

No man will contend that the transfer or the change in a vessel, and the obtaining a new register, are to be simultaneous. The one must precede the other, and unless the transfer, or the repairs and alterations of the hulk or rigging are in all cases to be made in the office from which the new register is to be obtained, a reasonable interval between these acts must be allowed. This reasonable interval will depend on the nature of the case.

When must a new register be obtained for a vessel which has been altered or partially transferred to a citizen while at sea? The act answers, at the time of delivering up her former certificate of registry. And when can this former certificate be delivered up? Certainly not till the return of the vessel, for the certificate is a paper necessary to the vessel, and is, therefore, always retained on board while at sea.

This construction is really so obvious and inevitable, that the endeavour to make it more clear would seem to be a total misapplication of time.

*The question, at what time the new register is to be obtained, and at what time the vessel shall be affected by the failure to obtain it, is susceptible of rather more doubt. There is no impossibility in obtaining a new register before entry, and the necessity of doing so must depend upon the words of the act, and upon the nature of the case. *57

It is obvious that on her arrival in port, the Missouri was an American vessel, and her cargo, when imported into the United States, was liable to the duties imposed on American, not on foreign bottoms. This is the clear

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consequence of establishing that a new register was not required before the arrival of the vessel.

If, then, the cargo when imported was liable only to the duties on goods imported in an American bottom, it would certainly require plain words to charge them, on any subsequent failure, with higher duties.

If the words of the section be examined, they are, as has been stated at the bar, prospective, not retrospective. They operate on future, not on past transactions. "The vessel *shall* be registered anew, (otherwise she shall cease to be deemed a ship or vessel of the United States.") That is, she shall cease after the lapse of the time when she ought to have been registered anew. But before that time had elapsed, she had, as an American vessel, actually imported a cargo whose liability to duties had commenced.

So in the subsequent clause: "And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States." That is, her future earnings shall not be attended with the advantages annexed to American bottoms.

This construction derives some corroboration from the 17th section. This section provides for the oath which is to be taken by an owner on the entry of an American vessel. "That upon the entry of every ship," &c.

* 58 *If upon the entry the owner shall refuse to take this oath, the vessel loses the privileges of an American bottom. If he takes it, and the oath discloses no fact which has already forfeited those privileges, she retains them. It is observable, that in order to retain them she is not required to take out a new register if an alienation has been made, and this strengthens the idea that if such an alienation be not in itself a forfeiture, a new register cannot be requisite so far as respects the voyage already concluded.

In the case of alienation to a foreigner, the privileges of an American bottom are *ipso facto* forfeited; but in the case of an alienation to a citizen they are not forfeited until after she ought to have been registered anew, and the oath which entitles her to enter as an American bottom does not require such new register.

But it has been argued that the omission to execute a

bill of sale in writing at the time of sale is in itself a forfeiture of the American character.

The words of the act are, "And in every such case of sale or transfer," &c.

These words attach to the omission the penalty which the law annexes to it, and no other can be inflicted. This is not that the vessel shall lose her American character, but that she shall be incapable of being registered anew. The bill of sale, therefore, can only be required when the new register is to be obtained, and if it be then produced, the new register cannot be refused.

An opinion has already been indicated, that in the case of a transfer or alienation at sea, a new register is not necessary to protect from alien duties the vessel which arrives, and the cargo which was actually imported while the old register was in full force. But it is the opinion of the court that in the case under consideration no new register was requisite.

The new register must be in every thing but its date a precise copy of the old one. The oath to be administered on the entry could be truly and fairly taken. The *names of all the persons who were at the time owners of * 59
the vessel were in the old register. The intermediate alienation and repurchase of part of the vessel had worked no forfeiture, and had created no necessity for a new register. The parties to whom the alienation had been made, not having property in the vessel at the time of entry, could not have taken the oath prescribed by law, which is in the present tense, and refers to the actual state of the property at the time of entry; nor could a new register have issued to them, in order to be delivered up for the purpose of making out another register for the original owners, who had become the present owners, without departing from the truth of the case, because the register also speaks in the present tense, and must recite the names of those who are the real owners at its date. Any new register which could have issued must have been, except in date, a duplicate of the old one, and must have been perfectly useless. Suppose the ship had been altered in a foreign port, but before her arrival and entry had resumed the form and dimensions mentioned in her old register, would it be pretended that a new register was necessary? What would such new register be but a copy of the old one? It is believed that in such a case

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it would not be suspected that any forfeiture of the old register, or any necessity for a new one, was produced, and between the two cases there appears to be no difference made by the letter or the spirit of the act.

The court is, therefore, unanimously of opinion, that the sentence of the circuit court be affirmed.

Judgment affirmed.

If a bond be executed by *O.* as a surety for *S.* to obtain an appeal from the judgment of a justice of peace in Maryland, and the bond is rejected by the justice, and afterwards, without the knowledge of *O.* the name of *W.* be interlined as an obligor who executes the bond, and the justice then accepts it, *it is void as to O.*

ERROR to the circuit court of the district of Columbia, sitting in Washington, in an action of *debt* upon four joint and several bonds, signed and sealed by *Mary Sweeny*, as principal, and *William Oneale*, *I. T. Frost*, and *Lund Washington*, as sureties, conditioned that she should prosecute her appeal upon four several judgments rendered against her by a justice of peace in Maryland. *William Oneale*, the defendant below, pleaded *non est factum*, and upon the trial of that issue took a bill of exceptions, because the court below (two judges only being present, and divided in opinion) did not, at his request, instruct the jury, "that if they should be satisfied by the evidence that the bonds were signed, sealed and delivered by *Mary Sweeny*, as principal, and *I. T. Frost*, and the *defendant* as her sureties, and were afterwards presented to *C. C.* (the justice who had rendered the judgments) for his approbation and acceptance of the securities, and were by him *refused and rejected*, and after such rejection were *interlined*, without the license, privity and knowledge of the defendant, by inserting the name of *Lund Washington*, as a co-obligor, who on the succeeding day, without the privity, knowledge and consent of the defendant, signed, sealed and delivered the bonds, which were afterwards approved of by the justice, that then such interlineation and execution of said bonds, by *Lund Washington*, rendered them void as to the defendant, and the plaintiff cannot recover in this suit."

By the *act of Maryland*, 1791, c. 68. s. 5. no execu-

tion upon a judgment of a justice of peace shall be stayed by an appeal, unless the person appealing, or some other in his behalf, "shall, immediately upon making such appeal, enter into bond, with sufficient sureties, *such as the justice by whom judgment shall be given shall approve of*, in double the sum recovered, with condition," &c.

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*P. B. *Key*, for the plaintiff in error, contended that the deeds were void, * 61

1st. By reason of the interlineation.

2d. By the rejection of them by the magistrate.

1. The alteration of the deeds by the interlineation was in a matter essential; it made them the deeds of four, when they were only the deeds of three persons.

It is immaterial whether the alteration is for the benefit of the obligor; the only question is, whether it substantially vary the deeds. *Esp. N. P.* 223, 224. *Cro. Eliz.* 626, 627. *Markham* v. *Gonaston.* *Moore*, 28. pl. 89. *Shep. Touch.* 68.

2. After the rejection of the bonds by the justice, they could never be set up again, without a new delivery by the defendant. *5 Co.* 19. b. *Whelpdale's Case.* The justice was substituted by the law for the obligee, and his rejection is equally fatal as if the bonds had been tendered to, and refused by, the obligee himself. *Shep. Touch.* 70. It might have been that the defendant held a counter security, which he released upon the rejection of the bond.

Mason, contra, contended,

That the interlineation was not material; and being made by a third person without the privity of the obligee, did not vacate the deeds, especially as it was for the benefit of the defendant. *11 Co.* 27. *Henry Pigot's Case.* *Esp. N. P.* 224. *Shep. Touch.* 68.

They were not less the deeds of the defendant, because they became also the deeds of another. This is in the nature of a judicial proceeding, and not a mere matter of contract between man and man. It is a security required by law in a civil action. It does not

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appear that the defendant was present when the bonds were rejected.

It is to be presumed that he intrusted Mrs. Sweeny, the principal, to deliver them for him, and she had a

* 62 *right to redeliver them in his name after the interlineation.

If the defendant had given up any counter security, it was his own folly so to do until his name had been erased from the bonds.

February 14.

MARSHALL, Ch. J. delivered the opinion of the court, that there was error in this, that the court below did not instruct the jury as prayed by the defendant. He observed, that the judges did not all agree upon the same grounds, some being of opinion that the bonds were void, by reason of the interlineation, and others that they were vacated by the rejection of them by the magistrate, and could not be set up again without a new delivery.

Judgment reversed, with costs.

SMITH AND OTHERS *v.* CARRINGTON AND OTHERS.

A witness interested to diminish certain admitted items in the plaintiff's account, is still a competent witness to disprove other items.

ERROR to the circuit court for the district of Rhode Island.

This was an action of *assumpsit* brought by the *plaintiffs in error*, subjects of Hamburgh, to recover the balance due upon an account current, the debit side of which consisted principally of the following charges, *viz.* insurance made in Hamburgh on the defendants' ship *Abigail*, from the United States to Hamburgh, and on the ship and cargo from Hamburgh to the Ha-

The defendant having read a letter from the plaintiff's agent, in answer to a letter from himself, cannot give in evidence a copy of his own letter, without proving it to be a true copy by a witness.

An exception may be taken to the opinion of the judge in his charge to the jury.

The court is bound to give an opinion to the jury on a question of *law*, upon request, if it be pertinent to the issue; but not if it involve a question of *fact*.

vanna, *and on an intended voyage back from the Havanna to Hamburgh;* advances made to the defendants to make up a cargo to the Havanna; bills of exchange accepted and paid; cash advanced, and commissions, charges, and interest.

*The *credit* side consisted chiefly of the proceeds of the freight of the ship, and of sundry articles of merchandise; remittances by bills of exchange; the sales of the ship, (she having been condemned and sold in London by virtue of a bottomry bond given by the defendants to the plaintiffs,) and of five *per cent.* of the premium of insurance on the intended return voyage from the Havanna to Hamburgh, the same having been returned by the underwriters to the plaintiffs, in consequence of the ship having finished her voyage in the United States, instead of returning to Hamburgh. * 63

At the trial below the plaintiffs took a bill of exceptions, which stated,

1st. That the defendants offered as a witness one Peleg Remington, who had become jointly and severally bound with the defendant, Carrington, in a bottomry or respondentia bond to the plaintiffs, in the sum of 31,950 dollars, conditioned to pay to the plaintiffs that sum, on the return of the ship to Hamburgh, the same being the amount advanced by the plaintiffs to the defendants in Hamburgh; and that the ship should so return; for which advance, with other demands, this action was brought. To the admission of which witness the plaintiffs objected, contending that he was interested to diminish the balance due from the defendants to the plaintiffs. But the defendants insisted he was a competent witness as to all the items of the account, except the advances for which he was bound, particularly with respect to a charge of 13,718 dollars and 56 cents, for premium of insurance on the intended return voyage from the Havanna to Hamburgh, and which voyage the defendants contended was never begun, and, therefore, they ought not to be charged with that premium; and especially as the defendants had expressly waived all objections to every other part of the plaintiffs' account. Whereupon the said witness was suffered by the court to testify as to the charge of that premium only. The bill of exceptions states it as admitted, that by the law of Hamburgh, the underwri-

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ters are not bound to return the premium upon a change of the voyage, unless that change be notified before the vessel sails.

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*2d. That the defendants offered in evidence a paper, purporting to be a copy of a letter from the defendant, Carrington, to *Smith & Ridgeway*, of Philadelphia, the *correspondents* of the plaintiffs; and *a letter* from *Smith & Ridgeway* to *Carrington*, purporting to be an answer thereunto; but gave no proof that the said copy of Carrington's letter was a true copy of the original, but it was not denied to be in his hand-writing, and it was proved that he was in Canton, and not in the United States at the time of trial, and had been in Canton for two years before, but had been corresponded with on the subject of this action since its commencement. Whereupon the court permitted the copy and the letter to go in evidence to the jury.

3d. The plaintiffs, after stating in the bill of exceptions, and referring to all the *testimony* and other evidence in the case, but not stating distinctly the *material facts* which they supposed to be the result of that testimony and evidence, and on which their prayer was founded, prayed the court to declare their opinion to the jury *whether*, if the plaintiffs had actually paid the premium to the underwriters, before notice of the change of the destination of the ship, they had a right, "*under the circumstances of the case*," to recover the same of the defendants. But the court refused to deliver an opinion particularly thereon.

4th. The bill of exceptions further stated, that the court, prior to the request last mentioned, declared to the jury that "the case wholly turned upon the point whether or not the defendants had given due and seasonable notice of the change of the destination of said ship. That it was a question proper for the jury to decide, whether such due and seasonable notice had been given, and that if they were of opinion that it had been so given, on considering the whole of the evidence, they ought not to allow the plaintiffs' said charge for the said *premium;* and with that direction left the same to the jury; and the jury aforesaid then and there gave their verdict for the plaintiffs for the sum of 13,677 dollars and 8 cents only, and disallowed the said charge and demand of the plaintiffs for the said

premium *of insurance, except one half *per cent.* which the jury allowed."

The errors assigned by the plaintiffs in error were,

1st. That the court admitted Remington to testify to the point, and under the circumstances mentioned in the bill of exceptions.

2d. That the court admitted the writing purporting to be a copy of a letter from the defendant, *Carrington*, to *Smith & Ridgeway*, and a writing purporting to be a letter from *Smith & Ridgeway* to the said *Carrington*, to be read in evidence, as stated in the bill of exceptions.

3d. That the court directed the jury that the case turned wholly upon the point whether due and seasonable notice had been given by the defendants of the change of the voyage, as stated in the bill of exceptions; and that this was wholly a question of fact, which it was their exclusive province to determine.

4th. That the court refused to direct the jury, in case it was fully proved to their satisfaction, that the plaintiffs had paid the premium in question previous to any notice or information whatever of the change of the voyage, as stated in the bill of exceptions, that they were entitled to recover of the defendants.

Robbins, for the plaintiffs in error, contended,

1st. That the underwriters, under the law of Hamburgh, had a right to retain the premium; and,

2d. That whether they had or not, the plaintiffs having received the defendants' orders to insure, and having actually done it, and paid the premium before those orders were countermanded, had a right to recover it back from the defendants.

1. That the underwriters had a right to retain the premium even under the English law, because the risk had commenced. It was to begin from the shore. But *the Hamburgh law being admitted, and no evidence being given that the change of voyage was notified to the underwriters before the ship sailed, the question is too plain to require argument. *66

2. But whether the underwriters were liable to refund or not, the plaintiffs have a right to recover from the defendants what they paid for premium under the existing orders of the defendants.

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If the underwriters are liable to refund, the plaintiffs are not bound to resort to them. That is the duty of the defendants.

The money being paid by the plaintiffs before the orders for insurance were countermanded, there can be no pretence that the plaintiffs are not entitled to recover.

3. Remington was not a competent witness, because in a suit against him upon the bond, he might show that the whole amount for which he was liable had been paid; which he could not do if the plaintiffs had a right to apply the credit side of the account to discharge the money by them advanced for the premium. He was, therefore, directly interested in the event of the suit.

4. There was no proof that the paper offered as a copy of the defendant *Carrington's* letter to *Smith & Ridgeway* was a copy of the original, and, therefore, it ought not to have been received, nor was there any evidence offered of the hand-writing of *Smith & Ridgeway* to the paper purporting to be a letter from them.

5. The opinion of the court that reasonable notice was wholly a question of *fact*, was erroneous. We contend that in all mercantile cases, reasonable notice is a question of law. 1 *T. R.* 167. *Tindall* v. *Brown.*

The court did not say of *what* or to *whom* notice was to be given.

But the underwriters were not bound to refund without *proof* as well as notice.

* 67 **Ingersoll*, contra.

1. As to the competency of *Remington*. A witness cannot be excluded if he is competent to answer any question. 3 *T. R.* 27. *Bent* v. *Baker*. If the suit had been brought only for the premium of insurance, his competency would have been unquestionable. Shall it be in the power of the plaintiffs to deprive the defendants of their witness, by blending other matters of account in their action? Surely not. But here all the other items of the plaintiffs' account were expressly admitted by the defendants before they offered Remington as a witness; and he was offered as a witness to that one item only.

2. As to the copy of *Carrington's* letter, it is con-

nected with that from *Smith & Ridgeway*, which the bill of exceptions states to be *a letter from them to Carrington*, purporting to be in answer to Carrington's letter to them. There was evidence that it was in his hand-writing, and that he had been absent in China for two years, so that he could not have fabricated it for the occasion. Where there is a connected correspondence, the whole ought to go to the jury. Smith v. Carrington.

In mercantile cases, the rules of evidence are not so strict as in other cases. 1 *Dall.* 16, 17. *Riche* v. *Broadfield Park*, 406. 2 *Str.* 1127. *Russel* v. *Boehme*. 3 *Dall.* 19. *Bingham* v. *Cabot*. 2 *Dall.* 384.

3. As to the opinion *given* and the opinion *refused*.

The question is not yet settled whether a bill of exceptions will lie to an erroneous opinion given by the judge in his charge to the jury at the trial; or to a proper opinion prayed and refused. 3 *Bl. Com.* 372.

MARSHALL, Ch. J. Is not the reason why the English books do not show such a case, because, upon a doubt as to the correctness of the opinion of the judge in his charge to the jury, a case is always made, and a new trial moved for, on the ground of misdirection?

Ingersoll. If the court had given an opinion upon the reasonableness of the notice, it would have been *error, because it is a matter of fact. But here the prayer was, that the court should give an opinion as to the *fact* of notice, as well as to the reasonableness of notice. The expression "*under the circumstances of the case*" refers the *matter of fact* to the court. It calls upon the court to say what are the circumstances of the case, and, consequently, to decide the *weight* of evidence, and to infer one fact from others, which is the peculiar province of the jury. *68

The jury is certainly to decide the facts; whether upon those facts the notice is reasonable, may be matter of law; but in Pennsylvania, and perhaps in other states, it is usual to submit the whole question to the jury, the court giving them information as to such points of law as have been decided.

If the facts are settled, the court may give instruction as to the law; but if the question of law cannot he abstracted from the question of fact, the whole must

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be submitted to the jury. 1 *Dall.* 255. *Robertson* v. *Vogle.* 2 *Dall.* 158. *Bank* v. *M'Knight.* 2 *Dall.* 195. *Mallory* v. *Kirwan.*

P. B. Key, in reply,

1. Abandoned the objection to the admissibility of Remington as a witness.

2. As to the copy of the defendant Carrington's letter.

No man can make evidence for himself. 2 *Vez.* 42. A copy cannot be given in evidence until you have proved that the original existed, and is lost or destroyed, or not in the power of the party to produce; and then the copy must be proved by a witness who compared it with the original.

It does not appear that the plaintiff admitted the paper supposed to be a letter from *Smith & Ridgeway*, to be genuine, and simply not denying is not admitting. But the plaintiff objected to both the copy and the letter, as appears by the whole tenor of the bill of exceptions.

*69 *3. As to the opinion prayed.

The expression "*all the circumstances of the case*," means all the circumstances of the case stated in the bill of exceptions, and the evidence to which it refers. This was certainly proper. It was not praying the court to decide the *facts*, but only the law arising upon those facts. The court has a right to say that *under the circumstances of the case*, the law is so.

MARSHALL, Ch. J. Does not that involve the *verity* of the facts?

Key. The court can say that there was *no* evidence whatever of notice, and if so, that the plaintiffs had a right to recover. The question what is evidence is matter of law.

But the court erred in submitting the whole question of reasonable notice to the jury. The *reasonableness* is matter of law. 2 *Inst.* 222. *Co. Litt.* 56. b. 1 *T. R.* 167. and 2 *T. R.* 186. *Tindall* v. *Brown.*

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MARSHALL, Ch. J. delivered the opinion of the court.

This case comes up on exceptions to certain opinions given by the judges of the circuit court of Rhode Island, at the trial of the cause before them.

The first exception is to the admission of *Peleg Remington* as a witness.

This exception appeared to be abandoned by the counsel in reply, and is, indeed, so perfectly untenable, that the court will only observe, that Peleg Remington does not appear to have been interested in the event of the cause in which he deposed, but certainly was not interested in the particular fact to which he was required to depose, and was, therefore, clearly a competent witness.

*The second exception is taken to the opinion of the court admitting as evidence a paper purporting to be the copy of a letter written by the defendant, *Carrington*, to *Smith & Ridgeway*, of Philadelphia, the correspondents of the plaintiffs, and also a letter from *Smith & Ridgeway* to the defendant, *Carrington*, purporting to be an answer to the said letter. *70

To the admission of the letter of *Smith & Ridgeway* no just objection appears. The verity of that letter is acknowledged on the face of the bill of exceptions, and no cause is stated why it should not have been read to the jury. But the admission of the copy of a letter written by one of the defendants stands upon totally different ground.

To introduce into a cause the copy of any paper, the truth of that copy must be established, and sufficient reasons for the non-production of the original must be shown.

If in this case the answer of *Smith & Ridgeway* had authenticated the whole letter of *Carrington*, the copy of that letter need not have been offered, since its whole contents would have been proved by the answer to it. If its whole contents were not proved by the answer, then the part not so proved was totally unauthenticated, and may have formed no part of the original letter. In this case, the answer cannot have authenticated the

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copy, because the bill states that the defendants gave *no proof* of its being true. This copy, therefore, not being proved to be a true copy, ought not to have gone before the jury. Into its importance or operation this court cannot inquire. It was improper testimony, and a verdict founded on improper testimony cannot stand.

For this error the judgment must be reversed, and the cause remanded to the circuit court of Rhode Island, to be again tried.

The third exception is taken to the refusal of the court to give an opinion on a question stated by the counsel for the plaintiffs. The difficulty of deciding on this exception does not arise from any doubt which

*71 *ought to have been produced by the facts in the cause, but from the manner in which the question was propounded to the court.

After a long and complex statement of the *testimony*, the counsel for the plaintiffs requested the court to declare whether, " if the plaintiffs had actually paid the said premium to the underwriters, before any notice of the change of the destination of the ship, they had a right, *under the circumstances of the case*, to recover the same of the defendants."

To this question the court refused to give an answer.

There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception; but it is equally clear that the court cannot be required to give to the jury an opinion on the *truth of testimony* in any case.

Had the plaintiffs' counsel been content with the answer of the court to the question of law, he would have been entitled to that answer; but when he involved facts with law, and demanded the opinion of the court on the *force and truth of the testimony*, by adding the words " under the circumstances of the case," the question is so qualified as to be essentially changed; and although the court might with propriety have separated the law from the fact, and have stated the legal principle, leaving the fact to the jury, there was no obligation to make this discrimination, and, conse-

quently, no error was committed in refusing to answer the question propounded.

The record also exhibits a part of the charge given to the jury, on which the counsel for the plaintiffs have argued as if it composed a part of the bill of exceptions. It is in these words: "And the said court, prior to the request last mentioned, did declare and give their opinion to said jury, that the case wholly turned upon the point whether or not the said defendants *had given due and seasonable notice of the change of the destination of said ship. That it was a question proper for the said jury to decide whether such due and seasonable notice had been given; and that if they were of opinion it had been so given, on considering the whole of the evidence, they ought not to allow the plaintiffs' said charge for said *premium*."

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That a party has a right to except to a misdirection of the jury contained in the charge of the judge who tries the cause, is settled in this court. (*Ante*, vol. 2. p. 239. *Church* v. *Hubbart*.)

That the opinion which the record ascribes to the judge in this case is incorrect, unless some other part of the charge shall have so explained it as to give to the words a meaning different from that which is affixed to them taken by themselves, is the opinion of this court.

The judges instructed the jury, "that the case wholly turned upon the point whether or not the defendants had given due and seasonable notice of the change of the destination of the said ship," and that if they were of opinion that due and seasonable notice had been given, they ought to find against the plaintiffs, on the question of their right to recover the premium advanced by them for the defendants.

Due and seasonable notice must have been given as soon after the destination of the vessel was changed as it could have been given, whether the premium had or had not been advanced by the plaintiffs before they received it; or this direction must have left it to the jury to determine whether notice was or was not due and seasonable, although it might not have been received by the plaintiffs before they had actually advanced for the defendants the sum in contest.

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On the first exposition, these words would amount to a clear misdirection of the jury; because, if the plaintiffs had paid to the underwriters, at the request of the defendants, the premium of insurance, before they received notice countermanding the directions to make such payment, the right given by subsequent circumstances *to the insured to demand its return from the underwriters, could not affect the claim of the plaintiffs on the defendants, for money fairly advanced by them for the use of the defendants.

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If the latter construction be adopted, there was still a misdirection on the part of the court. The judge ought not to have left it expressly to the jury to decide whether notice given immediately after the change of the destination of the vessel could be due and seasonable notice, unless it was received before the premium was advanced.

It is, however, not material to the present cause to determine whether this exception does or does not exhibit a misdirection to the jury, since we are unanimously of opinion, that for admitting a paper purporting to be the copy of a letter from Edward Carrington to Smith & Ridgeway, to go to the jury, which was not proved to be a copy, the judgment must be reversed.

Judgment reversed.

PENDLETON AND WEBB v. WAMBERSIE ET AL.

An assignee of an assignee of a copartner in a joint purchase and sale of lands may sustain a bill in equity against the other copartners and the agent of the concern, to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds.

ERROR to the circuit court for the district of Georgia, in a suit in equity, in which *Pendleton & Webb* were complainants, and *Emanuel Wambersie, James Seagrove, and the representative of James Armstrong, Jacob Weed*, and *Henry Osborne* were defendants.

The bill stated that Henry Osborne, Jacob Weed, James Armstrong, James Seagrove, and the complain-

ant, John Webb, on the 22d of December, 1786, entered into an agreement with each other, under seal, to procure lands on their joint account in the state of Georgia, to an amount not exceeding 200,000 acres, at their joint expense, and for their joint benefit. That *74 grants were obtained for about 165,000 acres. That Webb by deed transferred all his right to the lands and contract to John M'Queen, in consideration of 400*l.* sterling, to be paid in four equal annual instalments. That M'Queen, not having paid Webb, assigned his right to Pendleton, the complainant, who undertook to indemnify M'Queen against Webb's demand. That Webb has never received the money due from M'Queen. That Wambersie, as agent for the company, had sold 60,000 acres of the land in Holland, at one dollar and fifty-six cents per acre, had received in cash 51,000 dollars, and had made himself liable for the balance. That he has refused to pay to the complainant, Pendleton, the one fifth of the purchase-money. That the other defendants refuse to divide the residue of the lands, and to account for the profits, &c. That the lands are liable, in the hands of the purchasers, for the balance of the purchase-money, both to the complainant Webb, for the purchase-money due to him, and the complainant Pendleton, for his one fifth of the amount of the sales. The bill seeks a discovery of the amount of lands granted to the company, of the amount sold, &c. and prays that the defendants may account, and that the lands may be charged with the balance of the purchase-money, &c.

The defendants demurred for want of equity in the bill, and the court below sustained the demurrer, and decreed that the bill be dismissed, with costs.

But this court, without argument, overruled the demurrer, reversed the decree, and remanded the cause for further proceedings.

*EX PARTE BOLLMAN AND EX PARTE SWARTWOUT.

C. LEE moved for a *habeas corpus* to the marshal of the district of Columbia, to bring up the body of *Samuel Swartwout*, who had been committed by the circuit court of that district, on the charge of treason against the United States; and for a *certiorari* to bring up the record of the commitment, &c.

And on a subsequent day, *Harper* made a similar motion in behalf of *Erick Bollman*, who had also been committed by the same court on a like charge.(*a*)

This court has power to issue the writ of *habeas corpus ad subjiciendum*.

To constitute *a levying of war*, there must be an assemblage of persons for the purpose of effecting *by force* a treasonable purpose. Enlistment of men to serve against government is not sufficient.

When war is levied all those who perform any part, however *minute*, or however *remote from the scene of action, and who are actually leagued in the general conspiracy*, are traitors.

Any assemblage of men for the purpose of revolutionizing *by force* the government established by the United States in any of its territories, although as a step to, or the means of executing, some greater projects, amounts to *levying war*. The travelling of *individuals* to the place of rendezvous is not sufficient; but the *meeting of particular bodies of men, and their marching from places of partial, to a place of general rendezvous*, is such an assemblage as constitutes a levying of war.

A person may be committed for a crime by one magistrate upon an affidavit made before another. A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths.

Quære, whether, upon a motion to commit a person for treason, an affidavit stating the substance of a letter in possession of the affiant, be admissible evidence?

The clause of the 8th section of the act of congress, "*for the punishment of certain crimes against the United States*," vol. 1. p. 103. which provides that "the trial of crimes committed on the high seas, *or in any place out of the jurisdiction of any particular state*, shall be in the district where the offender is apprehended, or into which he may be first brought," applies only to offences committed on the high seas, or in some *river, haven, basin*, or *bay*, not within the jurisdiction of a particular state, and not to the *territories* of the United States, where regular courts are established, competent to try those offences.

The word "*apprehended*," in that clause of the act, does not imply a *legal arrest*, to the exclusion of a *military* arrest or seizure.

(*a*) On a former day (Feb. 5.) *C. Lee* had made a motion for a *habeas corpus* to a military officer to bring up the body of *James Alexander*, an attorney at law at New-Orleans, who, as it was said, had been seized by an armed force under the orders of General Wilkinson, and transported to the city of Washington.

CHASE, J. then wished the motion might lay over to the next day. He was not prepared to give an opinion. He doubted the jurisdiction of this court to issue a *habeas corpus* in any case.

JOHNSON, J. doubted whether the power given by the act of congress, vol. 1. p. 101. of issuing the writ of *habeas corpus*, was not intended as a mere auxiliary power to enable courts to exercise some other jurisdiction given by law. He intimated an opinion that either of the judges at his chambers might issue the writ, although the court collectively could not.

CHASE, J. agreed that either of the judges might issue the writ, but not out of his peculiar circuit.

MARSHALL, Ch. J. The whole subject will be taken up *de novo*, without reference to precedents. It is the wish of the court to have the motion made in a more solemn manner to-morrow, when you may come prepared to take up the whole ground. [But in the mean time Mr. Alexander was discharged by a judge of the circuit court.]

Ex parte Bollman and Swartwout.

The order of the court below, for their commitment, was in these words:

"The prisoners, Erick Bollman and Samuel Swartwout, were brought up to court in custody of the marshal, arrested on a charge of treason against the United States, on the oaths of General James Wilkinson, General William Eaton, James L. Donaldson, Lieutenant William Wilson, and Ensign W. C. Mead, and the court went into further examination of the charge: Whereupon it is ordered, that the said Erick Bollman and Samuel Swartwout be committed to the prison of this court, to take their trial for treason against the United States, by levying war against them, to be there kept in safe custody until they shall be discharged in due course of law."(*a*)

The oaths referred to in the order for commitment, were affidavits in writing, and were filed in the court below.(*b*)

*C. *Lee*, for *Swartwout*. * 77

Notwithstanding the decisions of this court in *Hamilton's Case*, 3 *Dall.* 17. and in *Burford's Case*, *ante*, vol.

(*a*) The warrant by which they were brought before the court was as follows:

DISTRICT OF COLUMBIA, to wit:

The United States of America, to the marshal of the district of Columbia, greeting:

Whereas there is probable cause, supported by the oath of James Wilkinson, William Eaton, James Lowrie Donaldson, William C. Mead, and William Wilson, to believe that Erick Bollman, (*Seal.*) commonly called Doctor Erick Bollman, late of the city of Philadelphia, in the state of Pennsylvania, gentleman, and Samuel Swartwout, late of the city of New-York, in the state of New-York, gentleman, are guilty of the crime of treason against the United States of America;

These are, therefore, in the name of the said United States, to command you that you take the bodies of the said Erick Bollman and Samuel Swartwout, if they shall be found in the county of Washington, in your said district, and them safely keep, so that you have their bodies before the circuit court of the district of Columbia, for the county of Washington, now sitting at the capitol, in the city of Washington, immediately to answer unto the United States of America of and concerning the charge aforesaid. Hereof fail not at your peril, and have you then and there this writ. Witness the honourable WILLIAM CRANCH, Esq. Chief Judge of the said court, this 27th day of January, 1807.

WILLIAM BRENT, Clerk.

Issued 27th day of January, 1807.

(*b*) For these affidavits, see Appendix, Note (A).

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3. p. 448. we are now called upon to show that this court has power to issue a writ of *habeas corpus*.

By the constitution of the United States, art. 3. s. 2. the grant of jurisdiction to the courts of the United States is general, and extends to *all* cases arising under the laws of the United States. This court has either original or appellate jurisdiction of every case, with such exceptions and under such regulations as congress has made or shall make. If congress has not excepted any case, then it has cognisance of the whole.

The appellate jurisdiction given by the constitution to this court includes criminal as well as civil cases, and no act of congress has taken it away. This court derives its power and its jurisdiction not from a statute, but from the constitution itself. No legislative act is necessary to give powers to this court. It is independent of the legislature; and in all the late discussions upon the question of putting down courts, it was admitted on all hands that the legislature could not destroy the supreme court.

But if this court has no criminal jurisdiction to *hear and determine*, yet they may have a criminal jurisdiction to a certain extent, viz. to inquire into the cause of commitment and admit to bail. This court has no original jurisdiction, except in certain cases; yet it has power to issue a mandamus in cases in which it has no appellate jurisdiction by writ or error or appeal, and will issue a prohibition even in a criminal case, if a circuit court should undertake to try it in a state in which the crime was not committed. So also if a district court should be proceeding upon a matter out of its jurisdiction, this court would grant a *prohibition*.

By the judiciary act, s. 14. vol. 1. p. 58. "All the before-mentioned courts" (and the supreme court was the court last mentioned in the preceding section) "shall have power to issue writs of *scire facias*, *habeas corpus*, *and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." "And either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment: *Provided*, that writs of *habeas corpus*

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shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are *committed for trial* before some court of the same, or are necessary to be brought *into court* to testify."

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It has been suggested that the words " and all other writs not specially provided for by statute, which may be *necessary for the exercise of their respective jurisdictions*," forbid the issuing of a *habeas corpus*, but in a case where it is necessary for the exercise of the court's jurisdiction. But the words " *necessary*," &c. apply only to the " *other writs not specially provided for.*"

In order to restrict in some degree the general expression " *all other writs*," the subsequent words are used. The writ of *habeas corpus* was particularly named, because it would not (in all cases where it ought to be granted) come under the general denomination of *writs necessary for the exercise of the jurisdiction of the court issuing it.*

But admitting, for argument, that a writ of *habeas corpus* cannot issue but where it is necessary for the exercise of the jurisdiction of the court issuing it, yet the term " jurisdiction" means the whole jurisdiction given to the court; and as this court has, by the constitution, jurisdiction in criminal cases, which jurisdiction is not taken away by any statute, it is a writ necessary for the exercise of its jurisdiction. Again by the 33d section of the same act, " upon arrests in criminal cases, where the punishment may be death, bail shall not be admitted *but by the* SUPREME or a circuit *court*, or by a justice of the supreme court, or a judge of a district court, *who shall exercise their discretion therein, regarding the nature* **and circumstances of the offence, and of the evidence, and the usages of law.*" By this section the supreme court has jurisdiction to *admit a prisoner to bail* in criminal cases punishable with death, and for that purpose *to examine into the nature and circumstances of the offence, and of the evidence.* For the exercise of this jurisdiction the writ of *habeas corpus* is necessary. There is no other writ, " agreeable to the usages of law," which will answer the purpose.

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It is doubtful whether a judge of this court can issue the writ while the court is sitting, and in a district in which he has no authority to act as a circuit judge.

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If it be said that the writ can only issue where it is in exercise of appellate jurisdiction, we say it is appellate jurisdiction which we call upon this court to exercise. The court below has made an illegal and erroneous order, and we appeal in this way, and pray this court to correct the error.

Rodney (Attorney-General) declined arguing the point on behalf of the United States.

Harper, for *Bollman*.

There are two general considerations:

1. Whether this court has the power generally of issuing the writ of *habeas corpus ad subjiciendum?*

2. If it has the power generally, whether it extends to commitments by the circuit court?

1. The general power of issuing this great remedial writ, is incident to this court as a supreme court of record. It is a power given to such a court by the common law. Every court possesses necessarily certain incidental powers as a court. This is proved by every day's practice. If this court possessed no powers but those given by statute, it could not protect itself from insult and outrage. It could not enforce obedience to its immediate orders. It could not imprison for contempts in its presence. It could not compel the attendance of a witness, nor oblige him to testify. It could
* 80 not compel *the attendance of jurors, in cases where it has original cognisance, nor punish them for improper conduct. These powers are not given by the constitution, nor by statute, but flow from the common law. This question is not connected with another, much agitated in this country, but little understood, viz. whether the courts of the United States have a common law jurisdiction to punish common law offences against the government of the United States. The power to punish offences against the government is not necessarily incident to a court. But the power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen.

It being clear, then, that incidental powers belong to this in common with every other court, where can we

look for the definition, enumeration and extent of those powers, but to the common law; to that code from whence we derive all our legal definitions, terms and ideas, and which forms the substratum of all our juridical systems, of all our legislative and constitutional provisions. It is not possible to move a single step in any judicial or legislative proceeding, or to execute any part of our statutes, or of our constitution, without having recourse to the common law. The constitution uses, for instance, the terms "*trial by jury*" and "*habeas corpus.*" How do we ascertain what is meant by these terms? By a reference to the common law. This court has power, in some cases, to summon jurors, and examine witnesses. If an objection be made to the competence of a witness, or a juror be challenged, how do you proceed to ascertain the competence of the witness or the juror? You look into the common law. The common law, in short, forms an essential part of all our ideas. It informs us that the power of issuing the writ of *habeas corpus* belongs incidentally to every superior court of record; that it is part of their inherent rights and duties thus to watch over and protect the liberty of the individual.

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Accordingly we find that the court of common pleas in England, though possessing no criminal jurisdiction *of any kind, original or appellate, has power to issue this writ of *habeas corpus*. This power it possessed by the common law, as an incident to its existence, before it was expressly given by the *habeas corpus* act. This appears from *Bushell's Case*, reported in Sir *Thomas Jones*, 18. and stated in *Wood's Case*, 3 *Wilson*, 175. by the Chief Justice, in delivering the opinion of the court. *Bushell's Case* was shortly this: A person was indicted at the *Old Bailey*, in London, for holding an unlawful conventicle. The jury acquitted him, contrary to the direction of the court on the law. For this some of the jurors, and *Bushell* among the rest, were fined and imprisoned by the court at the *Old Bailey*. *Bushell* then moved the court of common pleas for a writ of *habeas corpus*, which, after solemn argument and consideration, was granted by three judges against one. *Bushell* was brought up, and the cause of his commitment appearing insufficient, he was discharged. This took place before the *habeas corpus* act was passed, and

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is a conclusive authority in favour of the doctrine for which we contend. *Wood's Case*, 3 *Wilson*, 175. and 3 *Bac. Abr.* 3. are clear to the same point.

Whence does the court of common pleas derive this power? Not from its criminal jurisdiction; for it has none. Not from any statute; for when Bushell's Case was decided, there was no statute on the subject. Not from any idea that such a power is necessary for the exercise of its ordinary functions; for no such necessity exists, or has ever been supposed to exist. But from the great protective principle of the common law, which, in favour of liberty, gives this power to every superior court of record, as incidental to its existence.

The court of chancery in England possesses the same power by the common law, as appears from 3 *Bac. Abr.* 3. This is a still stronger illustration of the principle, for the court of chancery is still further removed, if possible, than the court of common pleas, from all criminal jurisdiction, still more exempt from the necessity of such a power for the exercise of its peculiar functions.

The court of exchequer also, as appears from the same authorities, though wholly destitute of criminal
* 82 jurisdiction, *possesses the power of relieving, by *habeas corpus*, from illegal restraint.

Hence it appears that all the superior courts of record in England are invested by the common law with this beneficial power, as incident to their existence. The reason assigned for it in the English law books is, that the king has always a right to know, and by means of these courts to inquire, what has become of his subjects. That is, that he is bound to protect the personal liberty of his people, and that these courts are the instruments which the law has furnished him for discharging his high duty with effect.

It may then be asked, whether the same reasons do not apply to our situation, and to this court. Have the United States, in their collective capacity, as sovereign, less right to know what has become of their citizens, than the king or government of England to inquire into the situation of his subjects? Are they under an obligation less strong, to protect individual liberty? Have not the people as good a right as those of England to the aid of a high and responsible court for the protection of their persons? Is our situation less advantageous in this

respect than that of the English people? Or have we no need of a tribunal, for such purposes, raised by its rank in the government, by its independence, by the character of those who compose it, above the dread of power, above the seductions of hope and the influence of fear, above the sphere of party passions, factious views, and popular delusion? Of a tribunal whose members, having attained almost all that the constitution of their country permits them to aspire to, are exempted, as far as the imperfection of our nature allows us to be exempted, from all those sinister influences that blind and swerve the judgments of men—have nothing to hope, and nothing to fear, except from their own consciences, the opinion of the public, and the awful judgment of posterity? It is in the hands of such a tribunal alone, that in times of faction or oppression, the liberty of the citizen can be safe. Such a tribunal has the constitution created in this court, and can it be imagined that this wise and beneficent constitution intended to deny to the citizens the valuable privilege *of resorting to this court for the protection of their dearest rights?

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On this ground alone the question might be safely rested; but there is another, not stronger indeed, but perhaps less liable to question.

Congress has expressly given this power to this court, by the *14th section of the act of 24th September*, 1789, commonly called the judiciary act. This section, according to its true grammatical construction, and its apparent intent, contains two distinct provisions. The first relates to writs of *scire facias* and *habeas corpus*; the second to such other writs as the court might find necessary for the exercise of their jurisdiction. As to writs of *scire facias* and *habeas corpus*, which are of the most frequent and the most beneficial use, congress seems to have thought proper to make a specific and positive provision. It was clearly and obviously necessary that such writs should be issued, not merely to aid the court in the exercise of its ordinary jurisdiction, but for the general purposes of justice and protection. The authority, therefore, to issue these writs, is positive and absolute; and not dependent on the consideration whether they might be necessary for the ordinary jurisdiction of the courts. To render them dependent on that consideration, would have been to deprive the

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courts of many of the most beneficial and important powers which such courts usually possess.

But the legislature foresaw that many other writs might, in the course of proceedings, be found necessary for enabling the courts to exercise their ordinary jurisdiction, such as *subpœnas*, writs of *venire facias*, *certiorari*, *fieri facias*, and many others known to our law. To attempt a specific enumeration of these writs might have been productive of inconvenience; for if any had been omitted, there would have been doubts of the power to issue them. Congress, therefore, instead of a specific enumeration of them, wisely chose to employ a general description. This description is contained in the words, "all other writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

*84 *The true grammatical construction of the sentence accords with this construction. The words of restriction or description ("*which may be necessary for the exercise of their respective jurisdictions*," &c.) stand here as a relative, and must refer to the next antecedent. There are two antecedents: 1st. "Writs of *scire facias* and *habeas corpus*;" and, 2d. "*All other writs.*" The second is the next antecedent to which, of course, the relative terms "*which may be necessary*," &c. must relate and be confined. Those words, therefore, cannot, either in grammatical construction, or according to the plain object of the legislature, be considered as restricting the grant of power in the first part of the sentence; but, merely as explaining the extent of the power given in the second part.

It is clear, then, that this section bestows on this court the power to grant writs of *habeas corpus* without restriction. Does this power extend to the application now before the court?

The term *habeas corpus* is a generic term, and includes all kinds of writs of *habeas corpus*; as well the writ *ad subjiciendum*, as *ad testificandum*, or *cum causâ*, &c.

But the 33d section of the same act must remove all doubt upon that point; for when it gives this court power to admit to bail in cases punishable with death, and commands this court to use their "*discretion therein, re-*

garding the nature and circumstances of the offence and of the evidence," it takes it for granted that the prisoner is to be brought before the court for the purpose of inquiring into those circumstances. If this section does not give the power, it shows at least that the legislature considered it as given before by the 14th section. Again, the latter part of the 14th section gives to each of the justices of this court, and of the district courts, the power for which we contend. It cannot be presumed that congress meant to give each judge singly a power which it denied to the whole court. That it confided more in the individual members of the court than in the court itself. That it considered the weight, dignity, character, and independence of each individual *member, as a more firm barrier against oppression than those of the tribunal itself, sitting for the exercise of the highest judicial functions known to our law. *85

This part of the statute is remedial and beneficial to the subject, and it is a sound maxim of law, that such statutes are to be construed liberally in favour of liberty.

Considering it as settled that congress intended to give this court the power to issue writs of *habeas corpus ad subjiciendum*, the next question is, whether congress had authority by the constitution, to confer that power?

The authority of congress must be tested by the constitution, and if they should appear to this court to have exceeded the limits there prescribed, this court must consider their act void. The power of the judiciary to collate an act of congress with the constitution when it comes judicially before them, and of declaring it void if against the constitution, is one of the best barriers against oppression, in the fluctuations of faction, and in those times of party violence which necessarily result from the operation of the human passions in a popular government. In the violence of those political storms which the history of the human race warns us to expect, this shelter may indeed be found insufficient; but weak as it may be, it is our best hope, and it is the part of patriotism to uphold and strengthen it to the utmost. But it is a power, of a delicacy inferior only to its importance; and ought to be exercised with the

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soundest discretion, and to be reserved for the clearest and the greatest occasions.

The question whether congress could confer upon this court the power of issuing the writ of *habeas corpus ad subjiciendum*, depends upon another question, viz. whether this power or jurisdiction be in its nature original or appellate. The *original* jurisdiction of this court being limited to certain specified cases, of which this is not one, it follows, that if the issuing such a writ of *habeas corpus* be an exercise of *original* jurisdiction,

* 86 *the power to issue it cannot be conferred on, or exercised by, this court.

This principle was established by the case of *Marbury* v. *Madison*, (*ante*, vol. 1. p. 175.) where the court said that "to enable this court to issue a *mandamus*, it must be shown to be an exercise of *appellate* jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms; and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that *will* must be obeyed. This is true. Yet the jurisdiction must be *appellate*, not *original*. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is in effect the same as to sustain an original action for that paper; and, therefore, seems not to belong to appellate, but to original, jurisdiction."

This passage needs no comment. The criterion which distinguishes appellate from original jurisdiction is, that it revises and corrects the decisions of another tribunal; and a *mandamus* may be used when it is for the accomplishment of such a purpose.

The object of the *habeas corpus* now applied for, is to revise and correct the proceedings of the court below, (under whose orders the prisoners stand committed,) so far as respects the legality of such commitment. If that court had given judgment against the applicants in the sum of one hundred dollars, the power to revise that judgment would have been appellate, and might have been given by congress to this court.

From a decision which might take a few dollars from their pockets they might be relieved. Shall the relief be rendered impossible because the decision deprives them of all that can distinguish a freeman from the most abject slave, of all that can render life desirable? Ex parte Bollman and Swartwout.

If the question, respecting the power of this court, under the constitution and the act of congress, if not *under the common law, to issue the writ of *habeas corpus ad subjiciendum*, were still open, it ought, on these principles and authorities, to be decided in our favour. But it is not open. It has been twice solemnly adjudged in this court. First in the case of *Hamilton*, 3 *Dall.* 17. not long after the court was organized; and very recently in the case of *Burford*. (*Ante*, vol. 3. p. 448.) We contend that the case is settled by these decisions, and that it is no longer a question whether this court has the power which it is now called upon to exercise. * 87

The exercise of this power, the benefit of these decisions, the protection of the law thus established, we claim as a matter of right, which this honourable court cannot refuse.

Shall it be said that no part of our law is fixed and settled, except what is positively and expressly enacted by statute? On the contrary, is it not certain that by far the greatest portion of that law on which our property, our lives and our reputation depend, rests solely on the decisions of courts? Shall it be said that all this important and extensive branch of the law is uncertain and fluctuating, dependent on the ever varying opinions and passions of men, and liable to change with every change of times and circumstances? Shall it be said that each individual judge may rightfully disregard the decisions of the court to which he belongs, and set up his own notions, his prejudices, or his caprice, in opposition to their solemn judgment? This is not the principle of our law; this is not the tenure by which we hold our rights and liberties. *Stare decisis* is one of its favourite and most fundamental maxims. It is behind this wise and salutary maxim that courts and judges love to take refuge, in times and circumstances that might induce them to doubt of themselves, to dread the secret operation of

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their own passions and prejudices, or those external influences, against which, in the imperfection of our nature, our minds can never be sufficiently guarded. In such times and circumstances, a judge will say to himself, "I know not how far I might be able, in this
* 88 case, to form an impartial opinion. *I know not how far my judgment may be blinded or misled by my own feelings or the passions of others, by the circumstances of the moment, or the views and wishes of those with whom I am connected. But here is a precedent established under circumstances which exclude all possibility of improper bias. This precedent is, therefore, more to be relied on than my judgment; and to this I will adhere as the best and only means of protecting myself, my own reputation, and the safety of those who are to be affected by my decision, against the danger of those powerful, though imperceptible influences, from which the most upright and enlightened minds cannot be considered as wholly exempt."

There have, indeed, been instances where precedents destructive to liberty, and shocking to reason and humanity, established in arbitrary and factious times, have been justly disregarded. But when in times of quiet, and in cases calculated to excite no improper feeling, precedents have been established in favour of liberty and humanity, they become the most sacred as well as the most valuable parts of the law, the firmest bulwark for the rights of the citizens, and the surest guardian for the consciences and the reputation of judges.

Such are the precedents on which we rely.

The case of *Hamilton* was decided soon after the establishment of the government, when little progress had been made in the growth of party passions and interests, and when whatever of political feeling can be supposed to have existed in the court, was against the prisoner. Yet this beneficial power was exerted for his relief. He was brought before this court by *habeas corpus*, and was discharged. The precedent thus established was, by this court, fifteen years afterwards, in the case of *Burford*, declared to be decisive.

The case of *Burford* was wholly unconnected with political considerations, or party feelings. The application was made on behalf of an obscure individual,

strongly suspected, though he could not be legally convicted, of a most odious and atrocious crime. The *abhorrence of his supposed offence, the strong circumstances which appeared against him, the course of his life, his general character, and the universal belief entertained of his guilt, all combined to excite against him every honest feeling of the human heart. Yet he had the benefit of one of those precedents which we now claim; and in his case the authority of another and a more solemn decision was added to the doctrine for which we contend. * 89

Again let it be asked, is not the law to be considered as settled by these repeated decisions? Are we still, as to this most important point, afloat on the troubled ocean of opinion, of feeling, and of prejudice? If so, deplorable indeed is our condition.

Misera est servitus, ubi lex est vaga aut incerta.

This great principle, *stare decisis*, so fundamental in our law, and so congenial to liberty, is peculiarly important in popular governments, where the influence of the passions is strong, the struggles for power are violent, the fluctuations of party are frequent, and the desire of suppressing opposition, or of gratifying revenge under the forms of law and by the agency of the courts, is constant and active.

2. The second head of inquiry is, whether the power to issue writs of *habeas corpus* be restricted by the circumstance of the commitment having been made by the *circuit court* of the district of Columbia.

Before such a principle is admitted, let us inquire into its possible and even probable effects on the liberties of the people. Is it not manifest that it would deprive the citizens of the guardianship of the most respectable and independent courts, and place their personal liberty at the mercy of inferior tribunals? Do we not know that congress may institute as many inferior tribunals, and may assign to the judges of these tribunals such salaries as they may think fit? Does it not hence result that a succession of courts may be instituted, to the lowest of which may be assigned salaries so contemptible, and duties so unimportant or so odious, as necessarily *and certainly to exclude every man of character, talents and respectability of every party? Will not such courts, therefore, be necessarily * 90

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filled by the meanest retainers, the most obsequious flatterers, and the most servile tools of those in power for the moment? Can any thing like independence or integrity be expected from such judges? Will they not act continually under the influence, not merely of their own party passions and prejudices, but of hope and of fear, those great perverters of the human mind? The precedent is already set that they may be turned out of office by the abolition of their courts; and their hopes of promotion to a higher station, and a better salary will depend on their servility and blind obedience to those in power. Let it be once established by the authority of this court, that a commitment on record by such a tribunal, is to stop the course of the writ of *habeas corpus*, is to shut the mouth of the supreme court, and see how ready, how terrible, and how irresistible an engine of oppression is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party which it hates and fears. Does the history of the human passions warrant the conclusion, or the expectation, that such an engine will not be used? We unfortunately know, from the experience of every age, that there are few excesses into which men may not be hurried by the lust of power or the thirst of vengeance. We too are men of like passions, and it behoves us, ere we have reached these fatal extremes, to provide, as far as the imperfection of human nature will permit, against the dangers which have assailed others, and which threaten us. The best mode of making this provision is to establish salutary maxims in quiet times, and to adhere to them steadily. Let it be now declared that there resides in this high tribunal (as respectable as our constitution can make it, and as independent as the nature of our government permits) a power to protect the liberty of the citizen, by the writ of *habeas corpus*, against the enterprises of inferior courts, which may be constituted for the purposes of oppression or revenge, and you place one barrier more round our safety.

* 91 *What stubborn maxim of law, what binding authority, requires the admission of a principle so repugnant to all our feelings and to the spirit of the constitution? On what ground or reason of law can it be pretended

that a commitment by the circuit court stops the course of the writ of *habeas corpus*?

Is it because the circuit court has competent jurisdiction to commit? This cannot be the reason, for every justice of the peace has competent jurisdiction to commit, and the reason, therefore, if it existed, would destroy the whole effect of the writ of *habeas corpus*.

Is it because the circuit court has competent jurisdiction to try the offence? This cannot be the reason, for in *Bushell's Case*, formerly cited from 3 *Wilson*, 175. it appears that a commitment by the sessions at the *Old Bailey*, a criminal court of very high authority, and which had jurisdiction over the offence, did not prevent the court of common pleas from relieving by *habeas corpus*.

So also by the forest laws in England, in former times, the judge of the forest had jurisdiction for the punishment of offences within the forest; and yet it appears, from 2 *Inst.* 290. that a person committed by the judge of the forest for such an offence, might be relieved by *habeas corpus* from the superior courts.

It is well known, too, that by the laws of England, the king has power to erect courts by special commission, with power to try and punish offences. From *Wood's Case*, 3 *Wils.* 173. it appears that a person committed by such commissioners, in a case which they had authority to try, may be relieved by *habeas corpus*. This, therefore, cannot be the reason.

Is it because the circuit court is a court of record? So is the court of *piepoudre*. But can it be imagined that if that court were to commit a man in England, the power of relieving by *habeas corpus* from the superior courts would be thereby taken away? Congress may erect as many inferior courts of record as they please. Can it be imagined that by instituting such courts they can, in effect, suspend the writ of *habeas corpus* indefinitely, and in cases where the suspension is expressly forbidden by the constitution? * 92

This power, moreover, has been shown to be appellate; and it is of the very essence of appellate power to review the decisions of inferior courts of record. Can it be imagined that such a decision may be reviewed where a small amount of property only is affected, and

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that there is no relief where it deprives a citizen of his liberty?

Between superior courts of record, of equal authority and co-ordinate rank, there may properly be a comity observed which would prevent them from attempting to interfere with the decisions of each other. Perhaps in England the court of common pleas would not attempt to release, by *habeas corpus*, a person committed by the exchequer, or chancery, and *vice versa*. But this comity cannot exist between superior and inferior courts; and there is no doubt that the court of king's bench, which is a court superior to the common pleas and the exchequer, would grant a writ of *habeas corpus*, for any person imprisoned by either of those courts for a criminal matter.

But this point does not rest on general reasoning alone, however strong. It has been expressly adjudged by this court. The case of *Burford*, formerly cited, is a complete authority on this point as well as on the former. *Burford's Case* had been acted on judicially by the circuit court of this district. He stood committed under its decision. That court did not, indeed, commit him in the first instance, but he was brought before it on *habeas corpus;* the order of commitment made by the justices of the peace was altered and modified, and he was committed by a new order from the circuit court. This recommitment was as complete an adjudication upon the subject as the commitment in the present case. One was as much a determination on record by the circuit court as the other; and one can no more than the other, preclude the exercise of this court's power to relieve by *habeas corpus*.

* 93 *Again, therefore, we claim the benefit of this decision. We again appeal to the great maxim *stare decisis;* we again deprecate the mischiefs that must ensue, if precedents in favour of liberty, made in times and under circumstances the most favourable to correct decision, should be disregarded in other times, and in situations where the existence of passion, prejudice and improper influence may be dreaded. We deprecate the dangers and mischiefs that must ensue, should the laws, on which our dearest rights depend, be thus left to fluctuate on the ever varying tide of circumstances and events, and we trust that the protecting power of this

high tribunal will now fix this great landmark of the constitution, and will place our liberties, as far as the imperfection of human things can permit, beyond the reach of opinion, of caprice, and of sinister views. Ex parte Bollman and Swartwout.

February 13.

MARSHALL, Ch. J.(*a*) delivered the opinion of the court.

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning *of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law. * 94

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognisance of any question between individuals, or between the government and individuals.

To enable the court to decide on such question, the power to determine it must be given by written law.

The inquiry, therefore, on this motion will be, whether by any statute compatible with the constitution of the United States, the power to award a writ of *habeas cor-*

(*a*) The only judges present when these opinions were given were, *Marshall*, Ch. J. *Washington*, *Johnson*, and *Livingston*, Justices. *Cushing*, J. and *Chase*, J. were prevented by ill health from attending.

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pus, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

The 14th section of the judiciary act (*Laws U. S.* vol. 1. p. 58.) has been considered as containing a substantive grant of this power.

It is in these words: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment. *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

*95 *The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some causes which they are capable of finally deciding.

It has been urged, that in strict grammatical construction, these words refer to the last antecedent, which is, "all other writs not specially provided for by statute."

This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt, is, that the true sense of the words is to be determined by the nature of the provision, and by the context.

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obli-

gation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*.

It has been truly said that this is a generic term, and includes every species of that writ. To this it may be added, that when used singly—when we say *the writ of habeas corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution.

*The section proceeds to say, that "either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." * 96

It has been argued that congress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled.

There is certainly much force in this argument, and it receives additional strength from the consideration, that if the power be denied to this court, it is denied to every other court of the United States; the right to grant this important writ is given, in this sentence, to every judge of the circuit, or district court, but can neither be exercised by the circuit nor district court. It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the *supreme* court the power to award the great writ of *habeas corpus*, there could be none which would induce them to withhold it from *every* court in the

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United States: and as it is granted to *all* in the *same sentence* and by the *same words*, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

The doubt which has been raised on this subject may be further explained by examining the character of the various writs of *habeas corpus*, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable
* 97 *the court to exercise its jurisdiction in causes which it is enabled to decide finally.

The various writs of *habeas corpus*, as stated and accurately defined by Judge Blackstone, (3 *Bl. Com.* 129.) are, 1st. The writ of *habeas corpus ad respondendum*, "When a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above."

This case may occur when a party, having a right to sue in this court, (as a state at the time of the passage of this act, or a foreign minister,) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the *United States*, or of a *state* court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and, consequently, could not be contemplated by the legislature. It would not be required, in such case, to bring the body of the defendant actually into court, and he would already be in the charge of the person who, under an original writ from this court, would be directed to take him into custody, and would already be confined in the same gaol in which he would be confined under the process of this court, if he should be unable to give bail.

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case.

The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by *habeas corpus*. They are not in-

ferior courts, because they emanate from a different authority, and are the creatures of a distinct government. Ex parte Bollman and Swartwout.

2d. The writ of *habeas corpus ad satisfaciendum*, "When a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to *some superior court to charge him with process of execution." *98

This case can never occur in the courts of the United States. One court never awards execution on the judgment *of* another. Our whole juridical system forbids it.

3d. *Ad prosequendum, testificandum, deliberandum*, &c. "Which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of congress; but the power to bring a person up that he may be tried in the proper jurisdiction, is understood to be the very question now before the court.

4th, and last. The common writ *ad faciendum et recipiendum*, "Which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated a *habeas corpus cum causâ*,) to *do and receive* whatever the king's court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below."

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

It would not be difficult to demonstrate that the writ of *habeas corpus cum causâ* cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally, that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a

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*state court against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the United States.

The only power, then, which, on this limited construction, would be granted by the section under consideration, would be that of issuing writs of *habeas corpus ad testificandum*. The section itself proves that this was not the intention of the legislature. It concludes with the following *proviso*, "That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts—where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

From this review of the extent of the power of awarding writs of *habeas corpus*, if the section be construed in its restricted sense; from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature.

But the 33d section throws much light upon this question. It contains these words: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted *but by the supreme* or a circuit *court*, or by a justice of the supreme court, or a judge
*100 of a district *court who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law,"

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners not committed by itself, may award a writ of *habeas corpus* for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

If, by the sound construction of the act of congress, the power to award writs of *habeas corpus* in order to examine into the cause of commitment is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted.

The only objection is, that the commitment has been made by a court having power to commit and to bail.

Against this objection the argument from the bar has been so conclusive that nothing can be added to it.

If, then, this were *res integra*, the court would decide in favour of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. (*United States* v. *Hamilton*, 3 *Dall.* 17.)

If the act of congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the constitution.

In the *mandamus* case, (*ante*, vol. 1. p. 175. *Marbury* v. *Madison*,) it was decided that this court would not exercise original jurisdiction except so far as that jurisdiction was given by the constitution. But so far as that *case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to gaol. * 101

It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be impri-

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soned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and, therefore, these questions are separated, and may be decided in different courts.

The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and, therefore, appellate in its nature.

But this point also is decided in Hamilton's Case and in Burford's Case.(*a*)

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.

That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.

The motion, therefore, must be granted.

JOHNSON, J. In this case I have the misfortune to dissent from the majority of my brethren. As it is a case of much interest, I feel it incumbent upon me to assign the reasons upon which I adopt the opinion that this court has not authority to issue the writ of *habeas corpus* now moved for. The prisoners are in confinement under a commitment ordered by the superior *court of the district of Columbia, upon a charge of high treason. This motion has for its object their discharge or admission to bail, under an order of this court, as circumstances upon investigation shall appear to require. The attorney-general having submitted the case without opposition, I will briefly notice such objections as occur to my mind against the arguments urged by the counsel for the prisoners.

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Two questions were presented to the consideration of the court.

1st. Does this court possess the power generally of issuing the writ of *habeas corpus*?

2d. Does it retain that power in this case after the commitment by the district court of Columbia?

(*a*) At February term, 1806, in this court.

In support of the affirmative of the first of these questions, two grounds were assumed.

1st. That the power to issue this writ was necessarily incident to this court, as the supreme tribunal of the union.

2dly. That it is given by statute, and the right to it has been recognised by precedent.

On the first of these questions it is not necessary to ponder long; this court has uniformly maintained that it possesses no other jurisdiction or power than what is given it by the constitution and laws of the United States, or is necessarily incident to the exercise of those expressly given.

Our decision must, then, rest wholly on the due construction of the constitution and laws of the union, and the effect of precedent, a subject which certainly presents much scope for close legal inquiry, but very little for the play of a chastened imagination.

The first section of the third article of the constitution vests the judicial power of the United States in one supreme court, and in such inferior courts as the congress *may from time to time establish. The second section declares the extent of that power, and distinguishes its jurisdiction into original and appellate. * 103

The *original jurisdiction* of this court is restricted to cases affecting ambassadors or other public ministers, and consuls, and those in which a state shall be a party. In all other cases within the judicial powers of the union, it can exercise only an appellate jurisdiction. The former it possesses independently of the will of any other constituent branch of the general government. Without a violation of the constitution, that division of our jurisdiction can neither be restricted or extended. In the latter its powers are subjected to the will of the legislature of the union, and it can exercise appellate jurisdiction in no case, unless expressly authorized to do so by the laws of congress. If I understand the case of *Marbury* v. *Madison*, it maintains this doctrine in its full extent. I cannot see how it could ever have been controverted.

It is incumbent, then, I presume, on the counsel, in order to maintain their motion, to prove that the issuing of this writ is an act within the power of this court in its

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original jurisdiction, or that, in its appellate capacity, the power is expressly given by the laws of congress.

This it is attempted to do, by the fourteenth and thirty-third sections of the judiciary act, and the cases of *Hamilton* and *Burford*, which occurred in this court, the former in 1795, the latter in 1806.

How far their position is supported by that act and those cases, will now be the subject of my inquiry.

With a very unnecessary display of energy and pathos, this court has been imperatively called upon to extend to the prisoners the benefit of precedent. I am far, very far, from denying the general authority of adjudications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right, or exempted from the necessity, of examining into the correctness or consistency of its own

* 104 *decisions, or those of any other tribunal. If I need precedent to support me in this doctrine, I will cite the example of this court, which, in the case of *The United States* v. *Moore*, February, 1805, acknowledged that in the case of *The United States* v. *Sims*, February, 1803, it had exercised a jurisdiction it did not possess. Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not *law*, and in a thousand instances have such cases been declared so by courts of justice.

The claim of the prisoners, as founded on precedent, stands thus. The case of Hamilton was strikingly similar to the present. The prisoner had been committed by order of the district judge on a charge of high treason. A writ of *habeas corpus* was issued by the supreme court, and the prisoner bailed by their order. The case of Burford was also strictly parallel to the present; but the writ in the latter case having been issued expressly on the authority of the former, it is presumed that it gives no additional force to the claim of the prisoners, but must rest on the strength of the case upon which the court acted.

It appears to my mind that the case of Hamilton bears upon the face of it evidence of its being entitled to little consideration, and that the authority of it was annihilated by the very able decision in *Marbury* v. *Madison*. In

this case it was decided that congress could not vest in the supreme court any original powers beyond those to which this court is restricted by the constitution. That an act of congress vesting in this court the power to issue a writ of *mandamus* in a case not within their original jurisdiction, and in which they were not called upon to exercise an appellate jurisdiction, was unconstitutional, and void. In the case of Hamilton the court does not assign the reasons on which it founds its decision, but it is fair to presume that they adopted the idea which appears to have been admitted by the district attorney in his argument, to wit, that this court possessed a concurrent power with the district court in admitting to bail. Now a concurrent power in such a case must be an original power, *and the principle in Marbury v. Madison applies as much to the issuing of a *habeas corpus* in a case of treason, as to the issuing of a *madamus* in a case not more remote from the original jurisdiction of this court. Having thus disembarrassed the question from the effect of precedent, I proceed to consider the construction of the two sections of the judiciary act above referred to.

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It is necessary to premise that the case of *treason* is one in which this court possesses neither original nor appellate jurisdiction. The 14th section of the judiciary act, so far as it has relation to this case, is in these words: "All the before-mentioned courts (of which this is one) of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." I do not think it material to the opinion I entertain what construction is given to this sentence. If the power to issue the writs of *scire facias* and *habeas corpus* be not restricted to the cases within the original or appellate jurisdiction of this court, the case of Marbury and Madison rejects the clause as unavailing; and if it relate only to cases within their jurisdiction, it does not extend to the case which is now moved for. But it is impossible to give a sensible construction to that clause without taking the whole together; it consists of but one sentence, intimately connected throughout, and has for its object the creation of those powers which probably would

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have vested in the respective courts without statutory provision, as incident to the exercise of their jurisdiction. To give to this clause the construction contended for by counsel, would be to suppose that the legislature would commit the absurd act of granting the power of issuing the writs of *scire facias* and *habeas corpus*, without an object or end to be answered by them. This idea is not a little supported by the next succeeding clause, in which a power is vested in the individual judges to issue the writ of *habeas corpus*, expressly for the purpose of inquiring into the cause of commitment. That part of the thirty-third section of the judiciary act which relates to this subject is in the following words: "And

* 106 *upon all arrests in criminal cases, bail shall be admitted, except where the punishment is death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and usage of law."

On considering this act it cannot be denied that if it vests any power at all, it is an original power. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted." I quote the words of the court in the case of *Marbury* v. *Madison*.

And so far is this clause from giving a power to revise and correct, that it actually vests in the district judge the same latitude of discretion by the same words that it communicates to this court. And without derogating from a respectability which I must feel as deep an interest in maintaining as any member of this court, I must believe that the district court, or any individual district judge, possesses the same power to revise our decision, that we do to revise theirs; nay, more, for the powers with which they may be vested are not so particularly limited and divided by the constitution as ours are. Should we perform an act which, according to our own principle, we cannot be vested with power to perform, what obligation would any other court or judge be under to respect that act? There is one mode of construing this clause, which appears to me to remove all ambiguity, and to render every part of it sensible and operative. By the consent of his sovereign, a foreign minister may be

subjected to the laws of the state near which he resides. This court may then be called upon to exercise an original criminal jurisdiction. If the power of this court to bail be confined to that one case, *reddendo singula singulis*, if the power of the several courts and individual judges be referred to their respective jurisdictions, all clashing and interference of power ceases, and sufficient means of redress are still held out to the citizen, if deprived of his liberty; and this surely must have been the intention of the legislature. It never could have been contemplated that the mandates of this court *should be borne to the extremities of the states, to convene before them every prisoner who may be committed under the authority of the general government. Let it be remembered that I am not disputing the power of the individual judges who compose this court to issue the writ of *habeas corpus*. This application is not made to us as at chambers, but to us as holding the supreme court of the United States, a creature of the constitution, and possessing no greater capacity to receive jurisdiction or power than the constitution gives it. We may in our individual capacities, or in our circuit courts, be susceptible of powers merely ministerial, and not inconsistent with our judicial characters, for on that point the constitution has left much to construction; and on such an application the only doubt that could be entertained would be, whether we can exercise any power beyond the limits of our respective circuits. On this question I will not now give an opinion. One more observation, and I dismiss the subject.

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In the case of Burford, I was one of the members who constituted the court. I owe it to my own consistency to declare that the court were then apprized of my objections to the issuing of the writ of *habeas corpus*. I did not then comment at large on the reasons which influenced my opinion, and the cause was this: the gentleman who argued that cause confined himself strictly to those considerations which ought alone to influence the decisions of this court. No popular observations on the necessity of protecting the citizen from executive oppression, no animated address calculated to enlist the passions or prejudices of an audience in defence of his motion, imposed on me the necessity

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of vindicating my opinion. I submitted in silent deference to the decision of my brethren.

In this case I feel myself much relieved from the painful sensation resulting from the necessity of dissenting from the majority of the court, in being supported by the opinion of one of my brethren, who is prevented by indisposition from attending.

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**February* 16.

The marshal of the district of Columbia having returned upon the *habeas corpus*, that he detained the prisoners by virtue of the before recited order of the circuit court of that district,

C. Lee now moved that they should be discharged; or at least admitted to bail; and contended,

1. That from the record of the circuit court, and upon the face of the proceedings, the imprisonment was illegal and oppressive; and,

2. That if the commitment was not illegal upon its face, yet, as the order of the court refers to the testimony on which it was founded, it will appear to be illegal upon the whole proceedings.

The commitment is not for trial at any particular *time*, before any particular *court*, nor in any particular *place*.

By the 3d *article of the constitution of the United States*, the trial of crimes shall be in the *state where they shall have been committed;* but when not committed in any state, the trial shall be at such place or places as congress may by law have directed. So by the 29th *section of the judiciary act of* 1789, vol. 1. p. 67. in all cases punishable with death, the trial shall be had in the *county* where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence; and by the 33*d section of the same act*, p. 73. offenders are to be arrested and imprisoned or bailed for trial before *such court of the United States, as by that act has cognisance of the offence;* and copies of the process shall be returned as speedily as may be into the clerk's office of *such* court, together with the recognisances of the witnesses for their appearance to

testify in the case, and if the commitment be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of the *district* where the delinquent is imprisoned to issue a warrant for the removal of the offender to *the district in which the trial is to be had.* Ex parte Bollman and Swartwout.

*These are provisions for a speedy and *fair* trial, in obedience to the constitution; for it has always been considered as necessary to a fair trial that it should be where the witnesses may easily attend, and where the party is known. The 6th amendment to the constitution provides that the accused "shall enjoy the right to a *speedy and public trial* by an impartial jury of the *state* and *district*, wherein the crime shall have been committed, which district shall have been previously ascertained by law." * 109

By the act for the punishment of certain crimes, s. 8. vol. 1. p. 103. it is enacted, that "the trial of crimes committed" "in any place out of the jurisdiction of any particular state shall be in the district where the offender is apprehended, or into which he may first be brought."

By the English *habeas corpus* act, whose provisions are considered as extending to cases even out of the act, the prisoner may petition the court for trial at the first term, and if not then tried he is entitled to bail of course. If the commitment is in a district in which he cannot be tried, he will not be entitled to this privilege, for he is still to be removed to the place of trial. Hence it is necessary that the commitment should state the court before whom the trial is to be had. It is also necessary in order that the district judge may know where to send him. No person *but* the district judge has authority to send him to the place of trial, and if the *commitment* be not made by the district judge, it is impossible that he should judicially know where to send him, unless the place of trial be mentioned in the warrant of commitment.

It is also necessary that the accused may know where to collect his witnesses together.

The order of commitment ought also to have stated more particularly the overt act of treason. It is too vague and uncertain.

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3. The testimony before the circuit court did not show *probable cause.*

*By the 4th amendment to the constitution it is declared, "that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; *and no warrants shall issue, but upon* PROBABLE CAUSE *supported by oath or affirmation.*"

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All the facts necessary to constitute this probable cause must appear upon oath or affirmation. It is not necessary, indeed, that there should be positive proof of every fact constituting the offence; but nothing can be taken into the estimate, when forming an opinion of the probability that the fact was committed by the person charged, but facts supported by oath or affirmation.

No belief of a fact tending to show probable cause, no hearsay, no opinion of any person, *however high in office*, respecting the guilt of the person accused, can be received in evidence on this examination.

The question, then, is, whether these affidavits exhibit legal proof of probable cause.

If the testimony be vague or ambiguous as to the person, or as to the offence, the court will apply the maxim of law, that every person is to be adjudged innocent unless proved to be guilty.

The facts stated in General Wilkinson's two affidavits of the 14th and 26th of December, consist of the letters of Col. Burr, the declarations of Swartwout, and the belief of General Wilkinson. Neither the letters of Col. Burr, nor the declarations of Swartwout, contain any ground for probable cause to believe that the prisoners, or either of them is guilty of treason: and General Wilkinson's belief, as he himself states, is founded upon those facts.

Mr. *Lee* went into a minute examination of those affidavits, to satisfy the court that the facts stated in them could at most prove an intent to set on foot an expedition against Mexico, in case of a war between this country and Spain. He contended that if the object was such an expedition *at all events*, and if they had intended *to force their way through the United States, for the purpose of attacking Mexico, and even if they had done so, they would not have been guilty of

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treason, but merely of lawless violence. Even if they had plundered the bank at New Orleans, or any private property, or had seized arms and vessels, the property of individuals, it would have been robbery, but not treason.

But the circumstance that no place of trial can be designated, is a sufficient reason for admitting them to bail. They certainly cannot be tried here, for it is not contended that they have here committed any offence; and this is not the district in which they were first apprehended or brought. They were seized by orders of a military officer 2,000 miles from this place, without any process of law or legal authority, and sent here to be disposed of by the executive. They have been committed for trial, not before any court, or in any particular district, and their imprisonment will be perpetual, unless government can find out when and where the offence was committed, and devise some means of transmitting them to the place of trial.

Mr. *Lee* attempted to discredit the affidavits of General Wilkinson by the circumstance that they were made, as he contended, to vindicate and justify the illegal seizure and transportation of the prisoners. He contended also that those affidavits ought to be totally discarded, because the oath upon which a warrant of arrest or commitment is to be grounded, must be made before the magistrate who is about to issue the warrant. *He* must be satisfied of the probable cause. The laws were open in New Orleans. General Wilkinson might have gone before a justice of peace there and made his oath, and obtained a warrant to arrest the prisoners. There was no necessity to proceed in this illegal and unprecedented manner.

F. S. Key, on the same side.

Unless this court can look behind the order for commitment, and examine the grounds upon which it was made, the writ of *habeas corpus* will be wholly useless; for every court or magistrate who commits a person to *prison, will take care to cover himself under the strict forms of law. *112

The constitution declares that treason against the United States shall consist only in levying war against

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them, or in adhering to their enemies, giving them aid and comfort.

An adherence to rebels is not an adherence to an enemy, within the meaning of the constitution. Hence, if the prisoners are guilty, it must be of levying war against the United States.

In England the books speak of two kinds of levying of war; *direct* and *constructive*. (*East's Cr. Law*, 67.) But there is only one kind in this country; and ought not to be in England.

By using the word "*only*," the constitution meant to take away all pretence of constructive treason. Every man is to answer for his own acts only. If 100 men conspire, and only 50 actually levy war, the latter only are guilty as principals.

And what reason can be given why there should not be the same distinction between principal and accessory in treason, as in other crimes. In a republican government, whose basis is the affection of the people, it is unnecessary to guard against offences of this kind with the same vigilance as in a monarchy or a despotism whose foundation is fear. (*4 Tucker's Bl. Appendix*, p. 39.) But if this construction of the constitution be not correct, and if the English authorities are to be considered in full force, it must be shown,

1st. That war has been levied; and,

2d. That the prisoners are confederates in that war.

The affidavits of General Wilkinson are not authenticated so as to make them evidence. It does not appear that an oath was administered to him. The act to prescribe the mode of authenticating public acts, records and judicial proceedings, &c. is extended to the
* 113 territory *of Orleans, by the act erecting that territory. (Vol. 7. p. 117.) And even if this be not strictly a judicial proceeding, yet it is within the meaning of that act.

The certificate of the secretary of state(*a*) only shows that it appears by the official returns to his office, that

(*a*) The secretary of state of the United States had certified under the seal of his office, that George Pollock and James Carrick were appointed justices of the peace for the county of Orleans, in the territory of Orleans, in the year 1805, as appears by the official returns of the secretary of the said territory, "remaining in the office of this department."

J. Carrick and George Pollock had been appointed justices of the peace for the county of Orleans; but not that they had taken the oaths necessary to qualify them to act. Ex parte Bollman and Swartwout.

But if these affidavits are examinable they do not show any act of treason. They prove no assemblage of men nor military array. There is not a tittle of evidence that any two men have been seen together with treasonable intent, whether armed or not. The supposed letter from Col. Burr speaks indeed of *choice spirits*, but he does not tell us they are *invisible spirits*.

The affidavits of Meade and Wilson relate only to rumours derived from General Wilkinson, whose business it was, if he could get such rumours there by no other means, to create them himself.

The territory of Orleans, if it was to be revolutionized, might be revolutionized without levying war against the United States.

There is no evidence that the prisoners knew that Col. Burr had any treasonable projects in view. Even if he had such views, he might have held out to them, as he did to others, only the Spanish expedition.

Again, the bench-warrant issued in this case for the arrest of the prisoners was illegal. The court has no authority to issue a bench-warrant, but upon a presentment by a grand jury, or for an offence committed in *the presence of the court. It is not a power inherent in the court, nor given by any law. The act of congress only gives to a judge out of court, or to a justice of peace, the power of arresting offenders. And it is a power inconsistent with a fair trial, because the court would thereby have prejudged the case, and decided upon the guilt of the prisoner. No such practice is known in Maryland, under whose laws the court below was acting. *114

February 17.

Jones, attorney for the district of Columbia, mentioned to the court, that *Hiort*, being better prepared upon points of practice, would make some observations in support of the form of the commitment.

MARSHALL, Ch. J. I understand the clear opinion

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of the court to be, (if I mistake it my brethren will correct me,) that it is unimportant whether the commitment be regular in point of form, or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done.

Rodney, Attorney-General.

The affidavit of General Wilkinson is sufficiently authenticated. The justices of peace in the territory of Orleans are officers of the United States; they are appointed by the governor of the territory, who is appointed by the President of the United States; and the secretary of the territory is bound by law to transmit copies of all the executive proceedings of the governor of the territory every six months to the President of the United States. (*Laws U. S.* vol. 7. p. 112, 113.) All the officers of the United States are bound to take notice of each other.

The act of congress respecting authentication of records, &c. is cumulative only. It does not repeal any former law.

There is some weight in the objection that the oath ought to be made before the magistrate who issues the
*115 *warrant. But one magistrate is as competent as another to administer the oath. The constitution is silent on the subject; and if it be taken before a person competent to administer it, it satisfies the provision of the constitution. How else could a criminal be arrested in one part of the United States, when the witness lived in another?

It is true that none of the evidence now offered would be competent on the trial; nor even if it appeared in a proper shape, would it be sufficient to convict the prisoners. But the question is whether, in this incipient stage of the prosecution, it is not sufficient to show probable cause.

The expedition against Mexico would not be treason, unless it was to be accomplished by means which in themselves would amount to treason. But if the constituted authorities of the United States should be suppressed but for one hour, and the territory of Orleans revolutionized but for a moment, it would be treason.

What would be treason by adhering to an enemy, if

done towards a rebel, will be a levying of war. (3 *Wilson's Lectures*, 105. 4 *Bla. Com.* 92.)

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In treason all are principals. There are no accessories. It has been argued (and the respectable authority of Judge *Tucker* is cited) that none are principals but those present at the treasonable act. The argument may have some weight, but it is a point at least doubtful, and therefore ought to be left to be decided on the trial.

It is true that we cannot at present say exactly when and where the overt act of levying war was committed, but from the affidavits we think it fair to infer that an army has been actually levied and arrayed. The declaration of one of the prisoners was, that Col. Burr "*was levying* an armed body of 7,000 men." How the fact has turned out to be since we do not know; and it is also true that we do not know that any men have been seen collected in military array. But Dr. Bollman informed General Wilkinson that he had seen a letter from Col. Burr, in which he says that he should be at Natchez *with 2,000 men on the 20th of December, and * 116
that he would be followed by 4,000 more, and that he *could have* raised 12,000 as easily as 6,000, but he did not think that number necessary. If Col. Burr was actually *levying* an armed body of men; if he expected to be at Natchez on the 20th of December with 2,000, and calculated upon being followed by 4,000 more, and if he found it so easy to raise troops, is there not a moral certainty that some troops at least have been raised and embodied.

It may be admitted that General Wilkinson was interested to make the worst of the story, but the declarations of the prisoners themselves are sufficient.

Jones, attorney for the district of Columbia, on behalf of the prosecution.

As to the objection that the commitment must be for trial in some court having jurisdiction over the offence.

It was uncertain whether any, and if any, what place was prescribed for the trial of this offence. But any court of the United States had jurisdiction to commit for trial by the act of congress for the punishment of certain crimes, &c. vol. 1. p. 103. s. 8. "The trial of crimes committed on the high seas, *or in any place* out

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of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought." Although the first part of the section speaks of certain crimes committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state," yet the last clause of the section is general, and in its terms applies to the trial of all crimes committed out of the jurisdiction of any particular state. This act of congress is the only exercise of the provision of the 3d article of the constitution respecting crimes committed not within any state. Unless this act of congress fixes the place of trial, there is no place prescribed, either by the law or the constitution, and the trial may as well be in the district of Columbia as elsewhere. But if this act of congress does fix the place, then it is objected, *that this district is neither that in which the prisoners were apprehended, nor that into which they were first brought.

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The answer is, that the act of congress means the district in which they shall be *legally* apprehended, that is, arrested by process of law. It could not mean a mere military seizure. But whether the court below had or had not jurisdiction to try the prisoners, it clearly had jurisdiction to commit them; and if their commitment be irregular, this court will say how they ought to be committed. *Laws U. S.* vol. 1. p. 73. s. 33.

It is objected, that although the judges and justices have power to arrest, yet the courts have not, and therefore cannot issue a bench-warrant but upon the presentment of a grand jury, or for an offence committed in the presence of the court. And the practice of Maryland is cited. But it is stated that at Montgomery Court, in Maryland, very lately, a venerable and ancient judge of that court did issue a bench-warrant for an offence not presented by the grand jury, nor committed in presence of the court.(a)

It is not necessary that the commitment should state

(a) F. S. Key stated that he was present at the transaction alluded to. The facts were, that after the court adjourned, and as the judge was going out of the court-house, a man who had been waiting in the yard assaulted a lawyer in the presence of the judge, for disrespectful language used by the lawyer in arguing a cause. The judge considered it as a contempt of court, and therefore directed a bench-warrant to issue.

the place of trial, nor that they are committed for trial. If at the time of commitment it be uncertain where they ought to be tried, they may be committed generally, *until discharged by due course of law.* In England it is only necessary that the commitment should be to some gaol in England. 2 *Hawk. P. C.* 120. b. 2. c. 16. s. 18.

As to the authentication of the affidavits of General Wilkinson, it being shown that Pollock and Carrick were duly appointed justices of the peace, and having undertaken to act as such, it is to be presumed that they have taken the necessary oaths. * 118

It is admitted that the constitution has prevented many questions as to the doctrine of treason. The intention of having a constitutional definition of the crime, was to put it out of the power of congress to invent treasons. But it was impossible to define what should in every case be deemed a levying of war. It is a question of fact to be decided by the jury from all the circumstances.

Warlike array is not necessary. It is only a circumstance. 1 *East's Cr. Law*, 66. According to the English books, a *direct* levying of war, is a war directly against the person of the king. A constructive levying of war, is war against the government.

If men have been levied, and arms provided, with a treasonable intent, this is a sufficient levying of war, without warlike array.

The affidavit of General Eaton establishes the treasonable intent in Col. Burr. The question, then, is, whether that intent, or a knowledge of that intent, can be brought home to the prisoners. Mr. Jones here went into an argument to show the connection of the prisoners with Col. Burr, and their knowledge of his projects. He observed that his argument, on a former occasion, respecting the president's message to congress, had been misunderstood. A state of war is a matter of public notoriety, and he had considered the president's message as evidence of that notoriety, it being a communication from the supreme executive in the course of his duty, to that department of government which alone could decide on the state of war.

He contended that no specific number, no sufficiency of force to accomplish the object, was necessary to constitute treason.

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If soldiers are levied and officered, with a treasonable intent, and equipments prepared, so that they can readily lay hold of their arms; although no men are
* 119 *actually armed; although only five men in a detachment should march to assemble at a place of rendezvous, and although there should be no warlike array, yet it would be treason. Any thing which amounts to setting on foot a military expedition, with intent to levy war against the United States, is treason.

The distinction between those who are present at the overt act of levying war, and those who are confederated, adhering, acting and assisting, giving aid and comfort, is contrary to all analogy. In treason all are principals.

In murder, if two conspire, and one is acting and assisting at such a distance as to give aid, he is equally guilty with him who gave the wound.

It has been insinuated that General Wilkinson is to be considered as *particeps criminis*. If that were the case, it would be no disqualification of his testimony.

Treason is a greater crime in republics than in monarchies, and ought to be more severely punished.

Harper, in reply, congratulated his country on the triumph of correct principles, in the abandonment, on the part of the prosecution, of the dangerous doctrine, that executive messages were to be received as evidence in a criminal prosecution.

[*Jones*. The sole purpose for which we introduced the president's message, was to show that the assemblage of a military force by Col. Burr was a matter of notoriety. We did not attempt or wish to introduce it as direct evidence.]

Harper. To use an executive message in a court of justice, for any purpose of proof whatever, so as to aid in the commitment of a citizen under a criminal accusation; to introduce it as evidence of any fact; (of notoriety, for instance, which is a fact;) is to give it the effect of *testimony*, and is a direct violation of the constitution.

* 120 *We object to the translation of the ciphered letter contained in General Wilkinson's affidavits, being ad-

mitted as evidence, because General Wilkinson has not sworn that it is a true translation, nor sent the original, with the key, so that the court can have a correct translation made. Nor is it proved that the original was written by Col. Burr, or by his direction, nor that the prisoners were acquainted with its contents.

Another objection to the affidavits is, that they were not made for the purpose of procuring an arrest. They were not made before the judicial officer on whose warrant the proceedings of the court were to be founded; and who would have been bound to cross-examine the witness, to sift the facts, and to judge how far they were proved, and how far they were sufficient to justify the proceedings. But, *after a military arrest*, the affidavits are drawn up by the author of the arrest, without cross-examination or inquiry, and were sworn to by him, as the justification of his conduct. The persons whom he has thus arrested are sent to a distant part of the country, and these affidavits are sent after them, to operate as the ground of their commitment and detention. No person can lawfully be committed on testimony so taken. In cases of arrests and commitments, the general rules of evidence are no further to be departed from than the necessity of the case requires. On application to a magistrate for a warrant of arrest, the evidence must necessarily be *ex parte*, but no other departure from the common rules of evidence is justifiable, because not necessary. It is a general rule of law respecting testimony, that it shall be taken before the tribunal which is to act upon it, or under the direction of that tribunal; that the person who is to decide, shall also inquire; that the inquiry shall not be before one tribunal, and the judgment pronounced by another. This rule, so important to the safety of persons accused, is equally applicable to arrests and commitments as to trials, and should, therefore, be equally observed. The party arrested and brought before the magistrate for commitment, has a right to be confronted with his accuser, and to cross-examine the witnesses produced against him, and by that means to explain circumstances which, at first view, might criminate him. But if the practice *which is attempted in this case be sanctioned by this court; if a military officer, or any other person, is to be permitted to seize a

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man, and send him 2,000 miles from the place of arrest, and from the place of the alleged transaction, and to send after him an *ex parte* affidavit as the ground of his subsequent commitment, the great security provided by law for the protection of innocence and liberty is broken down.

Mr. *Harper* then went into a minute examination of the contents of the affidavits, and contended that, if they could be considered by this court as evidence, they did not prove that treason had been committed, nor that the prisoners had participated in any crime or offence whatever.

February 18.

Martin, on the same side.

The order for the commitment was erroneous in directing the prisoners to be committed to the prison of the court. It ought to have been to the marshal. 1 *Salk.* 348. *Bethel's Case.* 5 *Mod.* 19. S. C.

This court cannot remand them, or commit them, upon this *habeas corpus*, for any crime but that for which they were committed in the court below; and can only commit them for trial before some court. The only power given by the 33d section of the judiciary act, is to cause offenders to "be arrested; and imprisoned or bailed, as the case may be, *for trial before such* court of the United States, as by this act has cognisance of the offence." The place of trial is to be decided by the place where the offence was committed.

The act of congress *for the punishment of certain crimes*, s. 8. vol. 1. p. 103. does not apply to crimes committed in any *territory* of the United States in which there are courts of the United States having cognisance of the offence. It applies only to offences committed upon the "*high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state.*"

* 122 *The courts of the United States erected in the territory of Orleans are competent to try the offence of treason against the United States committed within that territory. By the 8th section of the act of congress of 26th *March*, 1804, vol. 7. p. 117. erecting the

territory of Orleans, a district court of the United States is established therein, having all the original powers and jurisdiction of a circuit court of the United States. And by the same act, the "*act for the punishment of certain crimes against the United States*" is extended to that territory.

It was, therefore, a wanton and unnecessary exertion of arbitrary power to send the prisoners here, where they cannot be tried. If there is any probability that a crime was committed by the prisoners, it is equally probable that it was committed in the territory of Orleans. It is at all events certain that it was not committed here. The word *apprehended*, in the act of congress, cannot mean a *legal arrest* only. If it did, it would be in the power of a military commander to seize a man, and appoint the tribunal by which he shall be tried.

If it is the duty of this court to commit the prisoners for trial, it is equally its duty to bind over the witnesses to appear at the time and place of trial to testify in the case, and to return copies of the process, together with the recognisances of the witnesses, to the office of the clerk of the court having cognisance of the offence. This shows that, upon every commitment, the witnesses must be in the presence of the tribunal committing.

This court cannot commit, unless they first ascertain in what court the trial is to be had.

There is no legal evidence that General Wilkinson ever made oath to his statement. The certificate of the secretary is only that it appears by the return of the secretary of the territory of Orleans, that Pollock and Carrick were justices. A copy of that return ought to be certified.

**February* 19. * 123

The court not having made up an opinion, admitted the prisoners to bail until the next day. The *Chief Justice* stated that the court had difficulty upon two points, viz.

1. Whether the affidavit of General Wilkinson was evidence admissible in this stage of the prosecution; and,

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2. Whether, if admissible, his statement of the contents of the substance of a letter, when the original was in his possession, was such evidence as the court ought to notice.

If the counsel had any authorities on these points, the court said they would hear them.

February 20.

The *Chief Justice* asked if the counsel had found any authorities on the points mentioned yesterday.

Rodney, Attorney-General, said he had not; but he relied on general principles.

F. S. Key cited 3 *T. R.* 707. *The King* v. *The Inhabitants of Eriswell*, where the principal question was, whether the *ex parte* examination of the pauper taken before two justices, to whom *no* application was made for a removal of the pauper, was good evidence before two *other* justices, five years afterwards, upon an application for his removal, the pauper having in the mean time become insane. The judges of the court of king's bench were equally divided. But *Grose*, J. said, "nothing can be more unjust than that a person should be bound by evidence which he is not permitted to hear." "The common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross-examine." *Buller*, J. who was opposed to *Grose*, upon the principal question, admitted, "that if the taking the examination
* 124 were not a judicial act, but was merely *coram non judice*, it is *not evidence," and that "it must be a judicial act at the time it was taken, or cannot become so at all."

Lord *Kenyon*, Ch. J. said the two justices who took the examination "were not applied to for the purpose of making an order of removal; the overseers called upon them for no other purpose than to examine the pauper; all the proceedings, therefore, *were extrajudicial*; and the examination on oath might just as well have been taken before the parish clerk, and would have been as much entitled to credit as this."

So in this case we say that, as General Wilkinson did not apply to Justices Carrick and Pollock for a warrant to arrest Dr. Bollman and Mr. Swartwout, and as he did not make the affidavit for the purpose of obtaining from them such warrants, the whole proceedings before those justices were extrajudicial. The affidavits are not such as would support an indictment, if false. In the language of Lord Kenyon, they deserve no more credit than if they had been made before the parish clerk. If the affidavit be a judicial proceeding, it ought to be authenticated according to the act of congress. If it be *not* a judicial proceeding, it is not evidence.

MARSHALL, Ch. J. If a person makes an affidavit before a magistrate to obtain a warrant of arrest, such affidavit must necessarily be *ex parte*. But how is it on a motion to commit, after the person is taken? Must not the commitment be upon testimony given in presence of the prisoner?

Rodney, Attorney-General. The first affidavit would be sufficient, unless disproved or explained by the prisoner on his examination.

Harper. The *necessity of the case* is the only ground of an exception to the general rule of evidence; and that necessity ceases when the party is taken.

**February* 21. * 125

MARSHALL, Ch. J.(*a*) delivered the opinion of the court.

The prisoners having been brought before this court on a writ of *habeas corpus*, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case.

This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the

(*a*) The other judges present were *Chase*, *Washington* and *Johnson*. The opinion of Chief Justice *Marshall*, upon the trial of Col. Burr, in the circuit court at *Richmond*, in the summer of 1807, elucidates and explains some passages in this opinion which were supposed to be in some degree doubtful. For that opinion see Appendix (B).

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question to be determined is, whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail. "If," says a very learned and accurate commentator, "upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail."

The specific charge brought against the prisoners is treason in levying war against the United States.

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

To prevent the possibility of those calamities which result from the extension of treason to offences of minor
* 126 importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend.

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to

serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied. Ex parte Bollman and Swartwout.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.

Crimes so atrocious as those which have for their object the subversion by violence of those laws and those *institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide. * 127

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In

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the case now before the court, a design to overturn the government of the United States in New Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

In conformity with the principles now laid down, have been the decisions heretofore made by the judges of the United States.

* 128 *The opinions given by Judge Paterson and Judge Iredell, in cases before them, imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. Their opinions, however, contemplate the actual employment of force.

Judge Chase, in the trial of Fries, was more explicit.

He stated the opinion of the court to be, "that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the *quantum* of the force employed neither lessens nor increases the crime: whether by one hundred, or one thousand persons, is wholly immaterial." "The court are of opinion," continued Judge Chase, on that occasion, "that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war."

The application of these general principles to the particular case before the court will depend on the testimony which has been exhibited against the accused.

The first deposition to be considered is that of General Eaton. This gentleman connects in one statement the

purport of numerous conversations held with Col. Burr throughout the last winter. In the course of these conversations were communicated various criminal projects which seem to have been revolving in the mind of the projector. An expedition against Mexico seems to have been the first and most matured part of his plan, if indeed it did not constitute a distinct and separate plan, *upon the success of which other schemes still more culpable, but not yet well digested, might depend. Maps and other information preparatory to its execution, and which would rather indicate that it was the immediate object, had been procured, and for a considerable time, in repeated conversations, the whole efforts of Col. Burr were directed to prove to the witness, who was to have held a high command under him, the practicability of the enterprise, and in explaining to him the means by which it was to be effected.

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This deposition exhibits the various schemes of Col. Burr, and its materiality depends on connecting the prisoners at the bar in such of those schemes as were treasonable. For this purpose the affidavit of General Wilkinson, comprehending in its body the substance of a letter from Col. Burr, has been offered, and was received by the circuit court. To the admission of this testimony great and serious objections have been made. It has been urged that it is a voluntary or rather an extrajudicial affidavit, made before a person not appearing to be a magistrate, and contains the substance only of a letter, of which the original is retained by the person who made the affidavit.

The objection that the affidavit is extrajudicial resolves itself into the question whether one magistrate may commit on an affidavit taken before another magistrate. For if he may, an affidavit made as the foundation of a commitment ceases to be extrajudicial, and the person who makes it would be as liable to a prosecution for perjury as if the warrant of commitment had been issued by the magistrate before whom the affidavit was made.

To decide that an affidavit made before one magistrate would not justify a commitment by another, might in many cases be productive of great inconvenience, and does not appear susceptible of abuse if the verity of the certificate be established. Such an affidavit seems

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admissible on the principle that before the accused is put upon his trial all the proceedings are *ex parte*. The court, therefore, overrule this objection.

* 130 *That which questions the character of the person who has on this occasion administered the oath is next to be considered.

The certificate from the office of the department of state has been deemed insufficient by the counsel for the prisoners, because the law does not require the appointment of magistrates for the territory of New Orleans to be certified to that office; because the certificate is in itself informal, and because it does not appear that the magistrates had taken the oath required by the act of congress.

The first of these objections is not supported by the law of the case, and the second may be so readily corrected, that the court has proceeded to consider the subject as if it were corrected, retaining, however, any final decision, if against the prisoners, until the correction shall be made. With regard to the third, the magistrate must be presumed to have taken the requisite oaths, since he is found acting as a magistrate.

On the admissibility of that part of the affidavit which purports to be as near the substance of the letter from Col. Burr to General Wilkinson as the latter could interpret it, a division of opinion has taken place in the court. Two judges are of opinion that as such testimony delivered in the presence of the prisoner on his trial would be totally inadmissible, neither can it be considered as a foundation for a commitment. Although in making a commitment the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though from the nature of the case it must be *ex parte*, ought in most other respects to be such as a court and jury might hear.

Two judges are of opinion that in this incipient stage of the prosecution, an affidavit stating the general purport of a letter may be read, particularly where the person in possession of it is at too great a distance to
* 131 admit of *its being obtained, and that a commitment may be founded on it.

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Under this embarrassment it was deemed necessary to look into the affidavit for the purpose of discovering whether, if admitted, it contains matter which would justify the commitment of the prisoners at the bar on the charge of treason.

That the letter from Col. Burr to General Wilkinson relates to a military enterprise meditated by the former, has not been questioned. If this enterprise was against Mexico, it would amount to a high misdemeanor; if against any of the territories of the United States, or if in its progress the subversion of the government of the United States in any of their territories was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the assemblage of a body of men to effect it would be levying war against the United States.

The letter is in language which furnishes no distinct view of the design of the writer. The coöperation, however, which is stated to have been secured, points strongly to some expedition against the territories of Spain. After making these general statements, the writer becomes rather more explicit, and says, "Burr's plan of operations is to move down rapidly from the falls on the 15th of November with the first 500 or 1,000 men in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient in the first instance to seize on, or to pass by, Baton Rouge. The people of the country to which we are going are prepared to receive us. Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

There is no expression in these sentences which would justify a suspicion that any territory of the United States was the object of the expedition.

*For what purpose seize on Baton Rouge; why engage Spain against this enterprise, if it was designed against the United States? * 132

"The people of the country to which we are going are prepared to receive us." This language is peculiarly appropriate to a foreign country. It will not be contended that the terms would be inapplicable to a

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territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it is recollected that he was the governor of a territory adjoining that which must have been threatened, if a territory of the United States was threatened, and that he commanded the army, a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

"Their agents now with Burr say, that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

This is apparently the language of a people who, from the contemplated change in their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power. That the Mexicans should entertain these apprehensions was natural, and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a different faith from theirs, and who, by making them dependent on England or the United States, would subject them to a foreign power.

That the people of New Orleans, as a people, if really engaged in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

There certainly is not in the letter delivered to General Wilkinson, so far as the letter is laid before the court, one syllable which has a necessary or a natural reference *to an enterprise against any territory of the United States.

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That the bearer of this letter must be considered as acquainted with its contents is not to be controverted. The letter and his own declarations evince the fact.

After stating himself to have passed through New-York, and the western states and territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprise, he states their object to be, "to carry an expedition to the Mexican provinces."

This statement may be considered as explanatory of

the letter of Col. Burr, if the expressions of that letter could be thought ambiguous. Ex parte Bollman and Swartwout.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an inquiry from General Wilkinson, he said, "this territory would be revolutionized where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans."

If these words import that the government established by the United States in any of its territories, was to be revolutionized by force, although merely as a step to, or a mean of executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war. But on the import of the words a difference of opinion exists. Some of the judges suppose they refer to the territory against which the expedition was intended; others to that in which the conversation was held. Some consider the words, if even applicable to a territory of the United States, as alluding to a revolution to be effected by the people, rather than by the party conducted by Col. Burr.

But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage of *men for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling. * 134

The prisoner stated that "Col. Burr, with the support of a powerful association extending from New-York to New Orleans, was levying an armed body of 7,000 men from the state of New-York and the western states and territories, with a view to carry an expedition to the Mexican territories."

That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question, then, is, whether this evidence proves Col. Burr to have ad-

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vanced so far in levying an army as actually to have assembled them.

It is argued that since it cannot be necessary that the whole 7,000 men should have assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime.

This position is correct, with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary that there should be an actual assemblage, and, therefore, the evidence should make the fact unequivocal.

The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.

The particular words used by Mr. Swartwout are, that Col. Burr "was levying an armed body of 7,000 men." *If the term *levying*, in this place, imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

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It is thought sufficiently apparent that the latter is the sense in which the term was used. The fact alluded to, if taken in the former sense, is of a nature so to force itself upon the public view, that if the army had then actually assembled, either together or in detachments, some evidence of such assembling would have been laid before the court.

The words used by the prisoner in reference to seizing at New Orleans, and borrowing perhaps by force from the bank, though indicating a design to rob, and consequently importing a high offence, do not designate the specific crime of levying war against the United States.

It is, therefore, the opinion of a majority of the court, that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Ex parte Bollman and Swartwout.

Against Erick Bollman there is still less testimony. Nothing has been said by him to support the charge that the enterprise in which he was engaged had any other object than was stated in the letter of Col. Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both of the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the United States, those who admit the affidavit of General Wilkinson cannot doubt. But that no part of this crime was committed in the district of Columbia is apparent. It is, therefore, the unanimous opinion of the court that they cannot be tried in this district.

*The law read on the part of the prosecution is understood to apply only to offences committed on the high seas, or in any river, haven, basin or bay, not within the jurisdiction of any particular state. In those cases there is no court which has particular cognisance of the crime, and, therefore, the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offence was committed. *136

But in this case, a tribunal for the trial of the offence, wherever it may have been committed, had been provided by congress; and at the place where the prisoners were seized by the authority of the commander in chief, there existed such a tribunal. It would, too, be extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried.

The act of congress which the prisoners are supposed to have violated, describes as offenders those who begin or set on foot, or provide, or prepare, the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state, with whom the United States are at peace.

There is a want of precision in the description of the offence which might produce some difficulty in deciding

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what cases would come within it. But several other questions arise which a court consisting of four judges finds itself unable to decide, and, therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed, and if those whose duty it is to protect the nation, by prosecuting offenders against the
* 137 laws, shall suppose *those who have been charged with treason to be proper objects for punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offence has been committed, institute fresh proceedings against them.

SKILLERN'S EXECUTORS v. MAY'S EXECUTORS.

If the obligee of a bond obtain titles in his own name for part of the lands, the assignment of which to the obligor was the consideration of the boud, and suffer the titles to the residue of the lands to be lost by the non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond.

ERROR to the district court of the United States for the district of Kentucky, in chancery.

The facts of the case, as they appear upon the record, are as follows:

Skillern put into the hands of Richard May several land-warrants to locate in Kentucky, under an agreement that May should have half the land for locating the whole, who accordingly located the quantity of 2,500 acres in the name of Skillern, but not to his satisfaction, and the matter was not settled between them at the time of Robert May's death, when his interest in the lands so located descended to his son, John May, the defendants' testator. Skillern afterwards came to an agreement with John May, on the 6th of March, 1785, by which Skillern was to assign to John May one military warrant for 200 acres of land, and

A court of equity will annul a contract which the defendant has failed to perform, and cannot perform, on his part.

all the treasury warrants located in the name of Skillern with the entries and locations made thereon, which assignment was on the same day executed, but never lodged in the land-office, or the office of the surveyor of the county where the lands were situated. In consideration of this assignment, and in full of all demands by Skillern against the representatives of Robert May's estate, John May gave to Skillern a bond, dated March 6th, 1785, to convey to Skillern 1,000 acres of the land to which Robert May was entitled at his death, and which remained unsurveyed, to be chosen by Skillern before the 15th of June, 1786. *It was also agreed by another writing of the same date, that if Skillern would give up the bond for 1,000 acres, John May should convey to him 1,100 acres of other land described in the writing, and Skillern was to make his election of the one or the other before the 1st of October, 1786. This last agreement was afterwards cancelled, and a bond in lieu thereof given by John May to Skillern, dated October the 9th, 1787, to convey to the latter on or before the 1st of December, 1788, "eleven hundred acres of first rate elk-horn land, well watered, and lying within ten miles of Lexington." Skillern's Executors v. May's Executors. *138

Skillern, notwithstanding the assignment of his military and treasury warrants to John May, afterwards obtained patents thereon for 1,050 acres, of the value of 4,416 dollars and 66 cents.

There was no evidence that Skillern ever offered to convey those lands to May, or his representatives.

The bond of 6th of March, 1785, and that of the 9th of October, 1787, were both fraudulently placed by Skillern in the hands of his agent, for the purpose of enforcing payment of both. The agent, supposing both bonds to be due, entered into an agreement with John May's executors, the present defendants, for the discharge of the bond of 6th of March, 1785, and the same was given up by Skillern's agent to the defendants, with a receipt thereon. But the agent finding afterwards that the bond of 6th of March, 1785, was vacated by that of the 9th of October, 1787, refused to carry that agreement into effect, but brought an action of covenant upon the condition of the last-mentioned bond, and recovered damages to the amount of 8,433 dollars and 33 cents.

Skillern's Executors v. May's Executors.

John May devised his lands to his executors for the payment of his debts, and this bill was brought by Skillern in his life-time, to subject the same to the payment of the judgment recovered at law. Pending this suit in chancery, Skillern died, leaving infant heirs, and the suit was revived in the name of his executors. Sixty acres, part of the 1,050 acres, had been sold for
* 139 the payment of the *state* tax due from Skillern, *and the two tracts of 300 and 250 acres had been sold for the direct tax due to the United States, but were redeemed by the purchaser of the 60 acres.

After the filing of this bill, and after the death of Skillern, John May's executors filed a cross bill against Skillern's executors, and it was agreed that both suits should be tried at the same time.

The court below decreed a perpetual injunction as to 4,416 dollars and 66 cents, part of the judgment at law, the same being the value of the 1,050 acres patented in the name of Skillern, and decreed payment of the residue out of the real estate of John May, unless it should be otherwise paid, by a day named in the decree.

Both parties sued out their writ of error.

H. Clay, for Skillern's executors.

C. Lee, for May's executors.

It was contended, in behalf of *May's executors*,

1st. That inasmuch as both bonds, viz. that for 1,000 acres, and that for 1,100 acres, were given for one and the same consideration, a discharge of either was, in equity, a discharge of both; and that having discharged the first bond by a new engagement, the executors of Skillern could not, in equity, claim satisfaction of either.

2dly. That Skillern having taken to his own use part of the land which he had agreed to assign to May as a consideration of the bonds, could not enforce them in equity.

3dly. That as Skillern had suffered a part of the lands to be lost, by not paying the taxes, he had thereby made himself chargeable for the lands, and had in fact received a full equivalent for the consideration of the bonds; and, therefore, there ought to have been a decree for a perpetual injunction as to the whole amount of
* 140 the *judgment at law; especially as the fact of fraud

on the part of Skillern is expressly found by the jury. The half of 2,500 acres was all he was entitled to, if his conduct had been fair. But as it has been found otherwise by a jury, a court of chancery ought not to have given its aid to enforce any part of the judgment at law.

For *Skillern's executors* it was said, that it was not in the power of Skillern alone to put an end to the contract. That by surveying and patenting the lands, he had saved them from forfeiture for not surveying within the time limited by law. That although the lands had been sold for taxes, yet the redemption enured to the benefit of the right owner.

The jury found the value of the 1,050 acres of *land*, but not the value of the *title*. The *land* may be worth fifteen dollars an acre, but the *title* may be worth nothing.

The patents had issued by mistake in the name of Skillern, and that mistake was owing to May's not having filed the assignment in the proper office. Skillern's executors are ready and willing to transfer those titles to the defendants.

THIS COURT gave no other opinion in this case than is expressed in the following decree.

"It is the opinion of the court that G. Skillern, by acquiring to himself the legal estate to 1,050 acres of land, the equitable right to which he had transferred to John May, on the 6th of March, 1785, (and having never conveyed or offered to convey the said lands to May, or to his legal representatives,) and it appearing that at the time of the decrees rendered in these causes, certain parts of the said entries to which Skillern had thus acquired the legal title, and which constituted a part of the consideration of the bond on which the judgment at law was entered, had been lost in consequence of the neglect of Skillern to pay the taxes due thereon, the complainants below in the original suit were not entitled to the aid of a court of equity to enforce *the execution of * 141
the obligation of the 9th of October, 1787, or to obtain satisfaction of the judgment at law founded thereon.

"It is therefore decreed and ordered, that the decree of the district court rendered in the original cause be re-

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versed and annulled *with costs;* and this court doth remand the same to the said district court for further proceedings to be had therein, in order that an equal and just partition of the 2,500 acres of land mentioned in the said assignment of the 6th of March, 1785, be made between the legal representatives of the said George Skillern and the said John May.

"And as to so much of the decree in the cross suit as enjoins 4,416 dollars and 66 cents, part of the judgment at law, this court doth affirm the same; and as to the residue of the said decree, it is decreed and ordered, that the same be reversed and annulled, with costs; and this court, proceeding to give such decree in the said cross suit as the said district court ought to have given, it is further decreed and ordered, that the judgment at common law mentioned in the said bill be perpetually enjoined."

FRENCH'S EXECUTRIX *v.* THE BANK OF COLUMBIA.

The *endorser* of a promissory note for the accommodation of the *maker*, is entitled to strict notice.

If the drawer of a bill of exchange, at the time of drawing *has a right to expect that his bill will be honoured*, he is entitled to strict notice.

ERROR to the circuit court of the district of Columbia, sitting at Washington.

This was an action of assumpsit upon the promissory note of W. M. Duncanson, payable to George French or order, and by him endorsed to the plaintiffs, for 1,400 dollars, at 60 days, dated October 10th, 1798, and due December 9th—12th.

On the trial at law in the court below, the plaintiff in error took a bill of exceptions which stated the following

*142 facts: that the banking house of the plaintiffs was situated in Georgetown, in the district of Columbia, at the time the note became payable; in which town the defendant's testator also resided. That Duncanson, the maker of the note, lived in the city of Washington, four miles distant from the bank of Columbia. That the last day of grace upon the note expired with the 12th of December, 1798. That the defendant's testator was very ill, and confined to his bed, from the 9th to the 14th of December, 1798, on which last-mentioned day he died; that the defendant proved his will and took out letters

testamentary on the 28th of the same month. That on the 15th *of December* a notary public called at the house of *Duncanson*, the maker of the note, to demand payment, but was informed that he had gone into Georgetown, whereupon the note was protested; that one *Weems*, an agent of the defendant, had notice of the dishonour of the note in *January*, 1799, and *conversed with* and *endeavoured to make arrangements with* the plaintiffs for the same.

That the note was endorsed by the defendant's testator, without any valuable consideration passing *from him to* any person for the same, *merely to accommodate Duncanson*, the maker of the note, and to give *him* a credit with the plaintiffs for the amount thereof, and that the plaintiffs received the same with a knowledge of its being so drawn and endorsed; that the defendant's testator, in his life-time, and the defendant, since his death, *have suffered* no loss or injury from the circumstance of the note not having been demanded of the maker before the 15th of December, 1798, or of the want of notice to the defendant's testator, or to the defendant, other than as aforesaid; and that the court, at the plaintiffs' request, thereupon instructed the jury *that such laches and neglect of the plaintiffs, as to a demand on the maker, and in not giving other notice than as above stated to the endorsor, does not debar and take away the plaintiffs' right to recover upon that note in this action against the defendant.*

The defendant below took another bill of exceptions to the refusal of the court to instruct the jury that the neglect of the plaintiffs, to demand payment and to give *notice, as before stated, discharged the defendant's testator from all liability upon the note, if the jury should be satisfied by the evidence that Duncanson received the money from the plaintiffs, with the assent of the defendant's testator, after his endorsement, and that at the time of the drawing and endorsing of the note, it was the understanding of all parties that the money should be so paid; and that such payment and assent were a sufficient consideration passing from French to Duncanson.

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The judgment below being for the plaintiffs, the defendant brought her writ of error.

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Harper, for the plaintiff in error.

The plaintiffs below claimed a right to recover upon this note, notwithstanding their *laches*, upon three grounds.

1st. Because it was an accommodation note, and no consideration passed from French to Duncanson.

2d. That French had suffered no injury by the neglect of the plaintiffs; and,

3d. The assent of the defendant's agent, after the note became payable.

1st. It is not a note for the accommodation of the *defendant's testator*, but for that of W. M. Duncanson, the maker.

No man ought to be held liable upon a contract further than he has consented to bind himself. If this contract was *conditional*, he cannot be *absolutely* bound until the condition has been performed.

What, then, was the contract which the defendant's testator entered into by endorsing the note?

By the law of Maryland which must decide this case, and which on this subject is precisely the same as the law of England, an *exact* analogy exists between an endorsed promissory note and an *accepted* inland bill of exchange. *When an endorsed promissory note, payable to order, is endorsed by the payee, it is in truth an inland bill of exchange drawn by the payee, in favour of the endorsee, upon the maker, (his debtor by the note,) and by him *accepted*. Hence the law with respect to both kinds of paper is the same. The contract of the *first endorsor* of a promissory note is the same as that of the *drawer* of a bill of exchange. It is an express, not an implied contract. An implied contract is that which the law (to prevent a failure of justice) presumes the parties to have made, where they have failed to make an express contract for themselves; and courts will vary the terms of such implied contract according to the principles of natural justice. But by writing his name on the back of the note, the endorsor entered into an *express* contract, the terms of which are as well known, by a reference to the law merchant, as if they were written at large on the note. He does not thereby bind himself to pay *at all events*. He only says to the holder, "if you use due diligence in demanding the money of the maker, and he

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refuses to pay it, and if you give me reasonable notice thereof, I will pay you." It being, then, a part of the express contract between the parties, that the holder should in reasonable time demand the money of the maker, and give due notice of non-payment to the endorsor, before the latter can be charged, upon what principle can a court of justice dispense with the performance of those precedent conditions? There is no case *upon a promissory note*, in which they have been dispensed with, except in that of *De Berdt* v. *Atkinson*, 2 *H. B.* 336. and there it was done because the maker of the note was *known* by *all* the parties to be insolvent at the time of making and endorsing the note, and, therefore, the contract of the endorsor *in that case* was not supposed to be conditional, but absolute. But the authority of that case, although attended by such *special* circumstances, is shaken, if not overruled, by the case of *Nicholson* v. *Gouthit*, in the same *book*, p. 609. where notice to the endorsor of a promissory note was held necessary, *although the insolvency of the maker was known to the endorsor before the note became payable*, and *although he endorsed it for the accommodation of the maker, and merely to obtain him a credit.* The latter is in its circumstances more like the case now before the court, *than that of *De Berdt* v. *Atkinson.* The judges, in giving their opinion in *De Berdt* v. *Atkinson*, relied not on the actual insolvency, but on the *knowledge* of the insolvency by *all* the parties, at the time of making and endorsing the note; whereby it appeared that the defendant, in that case, had not annexed the usual conditions to his contract as endorsor; but had waived them; and that the waiver was known to the plaintiffs. * 145

It is true that in the case of *Nicholson* v. *Gouthit*, it appeared that *Burton*, the other endorsor, had put into the defendant's hands, funds to meet the payment of the note, but the note not having been demanded when due, the defendant had paid away those funds. But if the defendant was not entitled to notice, he paid away those funds in his own wrong, and, therefore, if any damage arose to him in consequence, it could not make his case the better. It may also be observed that the court, in giving an opinion, did not notice this circumstance as a ground of that opinion; the *Chief Justice* seems to exclude a presumption of that kind, because he says that

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the justice of the case is *with the plaintiff*, which could not be true if the defendant had suffered damages imputable to the *laches* of the plaintiff. The only ground upon which the court rested their opinion was, that the *form of guaranty* which the parties had adopted, required due notice to the endorsor, and therefore, although the justice of the case was with the plaintiff, they could not dispense with such notice.

Upon this ground the opinion is certainly inconsistent with the case of *De Berdt* v. *Atkinson;* for in the latter the same *form of guaranty* had been adopted, yet that circumstance was not deemed sufficient to render notice necessary, in a case where the undertaking of the endorsor was to pay at all events; an undertaking which, in that case, was presumed from the fact that the insolvency of the maker of the note *was known* to *all* the parties *at the time of making and endorsing* the note. But in the case of *Nicholson* v. *Gouthit*, the maker was not insolvent, but only embarrassed at the time of the making and endorsing of the note, and did not become insolvent until afterwards, and before the note became payable, so that there was no circumstance

* 146 upon which *to build the presumption that the defendant intended to make himself liable *at all events.*

The true principle which will reconcile all the cases upon this point is, "*that notice need not be given to him who is liable in the last resort.*"

In the present case, the insolvency of the maker of the note is not averred, nor any other circumstance to show that French was liable in the last resort.

If the note had been made by Duncanson to accommodate French, and French had received the money from the bank, then indeed it might have been contended, that as French was the person liable in the last resort, he was not entitled to notice. But the case stated is, that French endorsed the note to accommodate Duncanson, who received the money of the bank. The obligation of French, therefore, was simply that of an endorsor of a promissory note; or of the drawer of an inland bill of exchange.

Considered in this point of view, the plaintiffs rely upon those cases which say that the drawer of a bill of exchange, *without funds*, is not entitled to notice.

It is admitted that an analogy exists between an endorsed promissory note and an inland bill of exchange. But the analogy is not complete until the bill of exchange *is accepted.*

There is no case in which notice has been deemed unnecessary, *when the bill has been accepted*, except that of *Walwyn* v. *St. Quintin*, 1 *Bos. & Pull.* 652. which will be noticed presently. *In all the prior cases*, in which the want of funds has been holden as excusing the want of notice, *acceptance had been refused;* so that the question has never arisen on an *accepted* bill but in the single case of *Walwyn* v. *St. Quintin.*

It is admitted that it has been decided, that if the drawer has neither funds in the hands of the drawee before the bill becomes payable, *nor a right to draw*, he is not entitled to notice; and the reason given is, because *he cannot *expect* the bill to be accepted and paid, and therefore practises a fraud upon the holder; and because he *cannot* suffer injury by the want of notice. These reasons extend only to the case of a drawer who has *no right to draw*, and the bill *is not accepted;* for the acceptance is conclusive evidence that the drawer had funds, (or credit, which is the same thing in substance,) against every person but the acceptor, in a suit between him and the drawer. If the drawee has promised to accept the bill, the drawer has a right to expect that his bill will be accepted, and he has practised no fraud upon the holder of the bill. Notice of non-acceptance, and *à fortiori* of non-payment of such a bill, may be very material to the drawer, as he would be thereby liable for interest, damages and costs, which he would have a right to recover over against the drawee who had thus violated his faith, in not honouring his bill according to a promise; and by the want of such notice the drawer may lose his remedy against the drawee by his insolvency. * 147

This may be the case where the *drawer* draws the bill for *his own* accommodation without funds, and the *drawee* agrees to accept it to give the *drawer* a credit.

But in the present case the bill is drawn, not for the accommodation of the *drawer*, but of the *drawee*, and the drawee has not only agreed to accept, but has actually accepted it; and if the reasons for dispensing

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with notice did not apply to that case, much less can they to this.

If a bill of exchange be drawn to accommodate the *drawee*, the drawer has a right to expect that it will be accepted; and if accepted, has not only a right to *expect*, but to *insist*, that it shall be paid, precisely in the same manner as if it had been drawn upon funds in the regular course of mercantile transactions.

He stands precisely in the same situation as if it had been so drawn.

In a regular transaction, if the drawee, having funds after agreeing to accept, refuse *acceptance*, the holder
* 148 *may immediately call upon the drawer, who, after taking up the bill, may recover against the drawee the principal, interest, damages and costs.

So if the bill be drawn for the accommodation of the *drawee*, and be not accepted, the holder can immediately call upon the drawer, who upon taking it up, may recover of the drawee the amount of the bill, with interest, damages and costs.

Immediate notice of non-acceptance is, therefore, equally necessary in both cases; a failure of the drawee in either case being equally prejudicial to the drawer.

In a regular transaction, if, *after acceptance*, the acceptor, having funds, refuse to pay; the drawer, after taking up the bill, may recover against the acceptor the principal, interest, damages and costs.

So if a bill be drawn to accommodate the *drawee*, if, *after acceptance*, (which is the present case,) the acceptor refuse to pay, the drawer, after taking up the bill, may recover against the acceptor in like manner.

If the acceptors in both cases should become insolvent, both drawers would sustain precisely the same injury; the one by being unable to withdraw his funds, and obtain security for the interest, damages and costs, and the other by being unable to get a reimbursement of the principal, interest, damages and costs, which he had been compelled to pay for the accommodation of the drawee.

The two cases are precisely parallel; and if notice is necessary in one case, it is equally necessary in the other.

If the note of *Christian* to 2 *Bla. Com.* 470. be cited,

the answer is, that the author of that note refers to no case but *De Berdt* v. *Atkinson*.

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The only case reported, which has decided that the drawer of an *accepted* bill is not entitled to notice, is that of *Walwyn* v. *St. Quintin*, 1 *Bos. & Pull.* 652. The *bill there was drawn for the accommodation of the *payee*, and the action was by the *endorsee* against the *drawer*. The *acceptor* had funds of the *payee*, but not of the *drawer*.

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It is difficult to understand the chief justice in delivering the opinion of the court in that case. He says, "As far as concerns the drawer, it is, what it has been called, *a mere accommodation*." This is true, but it was not for his *own* accommodation, which is the only kind of accommodation that will justify the want of notice.

He then proceeds, "And all consideration of effects of the drawer in the hands of the acceptor may be laid aside." This again is strictly and literally true; but the drawer *had a fair pretence for drawing*, and the acceptance was *on the ground of a fair mercantile agreement;* for it is stated that the drawee had actually accepted the bill on the faith of funds put into his hands by the *payee* to meet the payment. And in the next page his lordship says, "But it may be proper to caution bill holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands notice is not necessary. The cases of acceptances upon the faith of consignments from the drawer not come to hand, and the case of acceptances *on the ground of fair mercantile agreements*, may be stated as exceptions; and there may be possibly many others." In the next sentence, also, he seems to admit, that where the drawer has no effects in the hands of the drawee, yet if he has "*a fair pretence for drawing*," although it is for the purpose of raising money by discount for himself, yet he is entitled to notice. Here, then, is a difference between the *opinion* and the *judgment* of the court, which it is difficult to reconcile.

He proceeds, "It seems clear that notice can be of no use to him, (the drawer,) his situation being this, that if the acceptor does not pay, he must; and may then, and not till then, resort to the acceptor to be re-

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imbursed; notice, therefore, can amount to nothing, since his situation cannot be changed." So in the case of a real negotiation, the situation of the drawer is, *150 that if the acceptor does not pay, he must; provided he has due notice. If the chief justice meant to say that St. Quintin was absolutely bound to pay if the acceptor did not, it was begging the question. But his argument seems to rest on the ground that the drawer could not resort to the acceptor until he (the drawer) had paid the bill. But notice was necessary to him, that he might know where to apply to take up the bill, before the acceptor should become insolvent. Notice might also be of use to him, even before payment, as he might take measures to get security from the acceptor, to indemnify him against the bill when it should come back to him. His situation would certainly be very much changed by the want of notice, if the acceptor should become insolvent after the bill became payable; for if due notice had been given, he might have taken up the bill, and compelled the acceptor to repay him the money.

His lordship, with great force of reasoning, says, "Perhaps, indeed, notice ought never to be dispensed with, *since it is a part of the same custom of merchants which creates the duty;* especially as the grounds for dispensing with it are such as cannot influence the conduct of the holder of a bill, at the time when he is to determine whether he will, or will not, give notice; for ninety-nine times in a hundred he cannot know whether the drawer have or have not effects in the hands of the acceptor, or for whose accommodation the bill was drawn. It has, however, been *resolved in* MANY *cases* where the drawer has had no effects in the hands of the ACCEPTOR, *that notice might be dispensed* with." In this last position his lordship was certainly mistaken, for there had not then been a single decision that notice was not necessary to the drawer, *if the bill had been accepted.*

He also says, "Where the drawer has no effects, *and has no fair pretence for drawing*, or where he draws without having effects intended to be applied in payment, and only for the purpose of raising money by discount for *himself*, and *à fortiori for the acceptor*, which is this case, it is fairly deducible from the cases

*which have been resolved, that notice need not be given."

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It is difficult to conceive why there should be a *stronger* reason for dispensing with notice to a drawer for the accommodation of the *acceptor*, than to a drawer for his *own* accommodation. Indeed in the former case, there is no reason for dispensing with notice which will not apply to every possible case.

The case of *Whitfield* v. *Savage*, 2 *Bos. & Pull.* 277. has settled the point that the insolvency of the acceptor will not dispense with notice to the drawer.

2. The second ground on which the plaintiffs rest their claim to recover is, that the defendant has shown no actual damage by reason of the want of notice.

But if the drawer, for the accommodation of the acceptor, is as much entitled to notice as the drawer upon actual funds, there is no more reason why the drawer should be bound to show actual damage in one case than in the other. It cannot be because he has paid no consideration for the bill, because, in the case of a bill drawn on actual funds, although the drawer pays a consideration when he deposits the funds, yet he also receives a consideration from the payee when he delivers the bill, so that when he has drawn and delivered the bill, he is nothing out of pocket; he has, in fact, parted with nothing. What he gave he has received.

In the present case, although French paid nothing to Duncanson, yet he received nothing from the bank; so that he stands exactly in the same situation as if he had paid Duncanson the whole money and received the same amount from the bank. In either case nothing rested with French; and he stood precisely in the same situation as if he had loaned the money to Duncanson upon his note, and had afterwards got the money from the bank upon the same note.

*3. As to the third ground on which the action is attempted to be supported, it is sufficient to say that the case stated in the bill of exceptions shows nothing, at most, but an attempt to compromise with the bank, without a knowledge of the fact of want of notice, or of the law arising upon that fact. *152

Mason, contra, contended that French was to be considered as the drawer of a bill of exchange without

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funds, and, therefore, not entitled to notice, and cannot set up the want of it as a defence, unless he can show that he has actually sustained an injury by such want. *Chitty*, 68. 88.

No consideration passed from French to Duncanson. If French had paid Duncanson for the bill, then that money would have been funds of French in the hands of Duncanson, upon which French might have drawn.

The burden of proof lies on French to show that he had funds, or that he has suffered actual loss by the want of notice.

In the case of *De Berdt* v. *Atkinson*, the insolvency of Brown did not affect the question, and was not relied on by the court. When Brown signed the note, he was notoriously insolvent, but he might have become solvent when the note became due. There is only one ground upon which that case can be supported, and that is, that it was an accommodation note, and governed by the same principle as a bill drawn without funds. Buller's opinion is strong that notice is only requisite in a fair mercantile transaction for value received in the regular course of trade. The same doctrine is laid down by *Christian*, in his note to 2 *Bl. Com.* 470. The case of *Nicholson* v. *Gouthit* is not contradictory to that of *De Berdt* v. *Atkinson*. The latter case turned upon the fact that the defendant had suffered a loss by the want of notice; he having given up a security which he held.

The case of *Walwyn* v. *St. Quintin* only decides the old point, that notice is not necessary if the drawer has no funds.

* 153 **Harper*, in reply.

It is said that it must be a mercantile transaction. A mercantile transaction is a transaction usual among merchants; and bills drawn for accommodation are more frequent among merchants than bills drawn upon funds.

The true principle is, that the *lex mercatoria* having fixed the terms of this species of contract, a man is supposed to contract accordingly.

It is said that a bill drawn without funds is not a mercantile transaction; but a man may fairly draw on what he supposes to be funds, but may be deceived.

A merchant may agree to accept, or to give credit, or to lend the money; a bill drawn under such circumstances would be a fair and regular mercantile transaction.

The fallacy of the argument is, that it was not an accommodation to French, but to Duncanson.

French selected this form of guaranty, and is entitled to all its privileges.

February 23.

MARSHALL, Ch. J. delivered the opinion of the court.

The material question in this case is, whether a person who endorses a promissory note for the accommodation of the drawer, be discharged from the responsibility which the endorsement creates, by the failure of the holder to demand payment of the maker in the usual time, and to give notice to the endorsor that the note is not paid.

That by the general rule of law the omission to demand payment from the maker when the note becomes payable, and to give notice to the endorsor that payment has been refused, discharges the endorsor, is admitted; *but from this general rule of law exceptions exist, and the counsel for the defendants in error contend that the case stated is comprehended in one of these exceptions. * 154

It is laid down as an exception to the general rule, in its application to bills of exchange, that if the drawer has no effects in the hands of the drawee, notice of the dishonour of the bill may be dispensed with, and the case of an endorsor of a promissory note for the accommodation of the maker, is said to come within the same reason and the same law.

The correctness of this position will be best tested by considering the reason of the rule, and the reason for the exception.

Why is it that notice must immediately be given to the drawer that his bill is dishonoured by the drawee? It is because he is presumed to have effects in the hands of the drawee, in consequence of which the drawee ought to pay the bill, and that he may sustain an injury

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by acting on the presumption that the bill is actually paid. The law requires this notice, not merely as an indemnity against actual injury, but as a security against a possible injury which may result from the *laches* of the holder of the bill. To this security, then, it would seem, the drawer ought to remain entitled, unless his case be such as to take him out of the reason of the rule.

A drawer who has no effects in the hands of the drawee, is said to be without the reason of the rule, and, therefore, to form an exception to it.

This has been laid down in the books as a positive qualification of the rule, but has seldom been so laid down, except in cases where, in point of fact, the drawer had no right to expect that his bill would be honoured, and could sustain no injury by the neglect of the holder to give notice of its being dishonoured. In reason it would seem, that in such cases only can the exception be admitted, and that the necessity of notice ought to be dispensed with only in those cases where
*155 *notice must be unnecessary, or immaterial to the drawer.

The reasoning of the judges, in most of the cases which have been cited, would seem to warrant this restriction of the exception.

The case of *Bikerdike* v. *Bollman* was a bill drawn by a debtor on his creditor, without a single accompanying circumstance which could raise an expectation that the bill would be accepted or paid. Notice in this case was declared to be unnecessary. Justice *Ashhurst* gives as a reason for this opinion, that the drawing was in itself a fraud. This reason must be considered as additional to the general ground on which the case was placed in the argument, which was, that the want of notice could not possibly affect the drawer. The particular reason given by Justice *Ashhurst* for his opinion, is clearly inapplicable to any case in which the drawer was justified in drawing.

Into the opinion of Justice *Buller* some general reasoning is introduced, from which it is fairly deducible that he considered the drawer as having no right to expect that the bill would be paid, and as being liable to

no injury from the want of notice, and that these were the true grounds of the exception.

He says, "If it be proved on the part of the plaintiff, that from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured."

These observations were, in fact, applicable to the case, for the drawer was the debtor of the drawee, and had no right to draw the bill, nor reason to expect that it would be accepted.

*This principle was recognised in *Goodall et al.* v *Dolly*, in which the same idea, so far as respects the impossibility of injury to the drawer, was repeated. * 156

This point came on again to be considered in the case of *Rogers* v. *Stephens*, 2 *T. R.* 713. in which, as between the drawer and drawee there was no pretext of a right to draw. It was said that a third person had stated himself to have funds in the hands of the drawee; that the bill was really drawn on the credit of those funds, and that loss had been actually sustained from the want of notice. But these facts formed no part of the case. If they had, it is apparent that, in the opinions of Lord *Kenyon* and Justice *Grose*, they would have been decisive in favour of the necessity of notice, unless that necessity had been dispensed with by the subsequent conduct of the drawer. Lord *Kenyon* states the reason why notice need not be given to the person who draws without funds in the hands of the drawee to be, "because the drawer must know that he had *no right to draw* on the drawee." The opinions of Lord *Kenyon* and Justice *Grose* in this respect, though not assented to, were not controverted by Justice *Ashhurst*.

The decision in *Rogers* v. *Stephens* was made on the authority of *Bikerdike* v. *Bollman*.

It would seem to be the fair construction of these cases, that a person having a *right to draw* in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee,

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or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and, therefore, as not coming within the exception to the general rule.

The transaction cannot be denominated a fraud, for in such case it is a fair commercial transaction.

Neither can it be truly said that he had no right to expect his bill would be paid, for a person authorized to draw must expect his draft will be honoured.

* 157 *Neither can it be said that he has virtual notice of the protest, and that actual notice is useless, and the want of it can do him no injury; for this is only true *when at the time of drawing the drawer has no reason to expect that his bill will be paid.*

A person having a right to draw, and a fair right to expect that his bill will be honoured, would not come within the reason of the exception, and, therefore, it may well be contended, ought not to be brought within the exception itself.

This doctrine appears to be contradicted in the case of *Walwyn* v. *St. Quintin.*

In that case the bill was drawn to accommodate the *endorsor*, who had previouly placed securities, on which he wished to raise money, in the hands of the acceptor; but the *drawer* had no effects in his hands. It was determined that, in this case, notice to the drawer was unnecessary.

If this determination should be considered without examining the reasoning on which it was founded, the reader would conclude that the single circumstance of drawing without funds in the hands of the drawee belonging to the *drawer*, subjected him, without notice, to the payment of his bill, if dishonoured, at any period of time when not barred by the act of limitations; and that no demonstration of his perfect right to draw, or of the loss to which the want of notice had exposed him, could relieve him from the claim of the holder of the bill. For in this case, the drawee *having accepted on funds*, the drawer *had a right to expect that the bill would be paid*, could not be chargeable with fraud in drawing, nor required to prepare other funds to prevent the disgrace and injury of his bill's being dishonoured, or to take measures to secure himself against the acceptor or endorsor. He does not appear

to have come within any one reason assigned in the cases of *Bikerdike* v. *Bollman*, or of *Rogers* v. *Stephens*, for the exception stated in those cases to the general rule. French's Executrix v. Bank of Columbia.

*This induces the necessity of examining with particular attention the reasons given by the judge, which must be considered as explanatory of the decision. *158

In delivering the opinion of the court, Lord Chief Justice *Eyre* said, "The true fact is, that this was the acceptor's bill, and not the drawer's." "The transaction in this case was a mode by which the acceptor advanced a sum of money to the payee, and the drawer was a mere instrument of the acceptor." "It seems clear, that *notice can be of no use to him*, his situation being this, that if the acceptor do not pay, he must, *and may then, and not till then*, resort to the acceptor to be reimbursed. Notice, therefore, can amount to *nothing*, for *his situation cannot be changed.*"

It is observable that the principle supposed to be laid down in the cases previously adjudged as constituting the reason for the exception is here expressly recognised, and forms the great and operative motive for the judgment of the court. It is, that notice could be of *no use*, that the drawer could not avail himself of it, that he could take no step which would in *any manner change his situation*, that he could have no *recourse* against the acceptor until he paid the bill.

In no case is the reason of the exception more explicitly given, and the only difficulty is to apply the reasoning to the facts as reported.

The court seem to have supposed, that since the drawer could not maintain an action against the acceptor until he had taken up the bill, that it was perfectly useless to enable him, by proper notice, to employ those other various means which he might have taken to secure himself. Such is not the reasoning of the judges in the cases previously decided; and this reasoning certainly would not be permitted to apply to an endorsor who had given value for the bill not knowing that it was drawn without funds in the hands of the drawee. Yet he would be unable to recover from the drawer until he had taken up the bill.

*If an action could not have been maintained, might *159

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not the drawer have effects of the drawee in his hands which he might retain; or might not various other means of saving himself be neglected, in consequence of the opinion that the bill would be paid? If this might be, how can it be true that notice can be of no use to him?

If the fact even be that the drawer could only sue the acceptor in such a case as this, after having himself discharged the bill, still he ought to have notice, that he might immediately take it up for the purpose of proceeding against the acceptor.

The reasoning of Lord Chief Justice *Eyre*, to be perfectly consistent with itself and with the principles laid down in previous decisions, would seem to be predicated on an understanding on the part of the drawer when the bill was drawn, that it was not to be paid by the acceptor; or on the idea that a bill drawn without funds is not a commercial transaction, and not subject to commercial rules.

The presumptions are rendered the stronger from the cases afterwards stated, in which a drawer without funds in the hands of his drawee would still be entitled to notice. These are "*acceptances on the faith of consignments from the drawer not come to hand*," and "*acceptances on the ground of fair mercantile agreement;*" to which, he says, may possibly be added many others.

If the exception admits of these exceptions and of many others, it would be difficult to apply it to any case of a fair transaction, where the drawer had really a right to draw, unless it be supposed not to be governed by the law merchant.

The judge next proceeds to describe the case in which notice is not requisite.

He says, "Where the drawer has no effects, *and has no fair pretence for drawing*, or where he draws without effects intended to be applied in payment, and only
* 160 *for the purpose of raising money by discount for himself, and *à fortiori* for the acceptor, it is fairly deducible from the cases that notice need not be given."

It is not only necessary that the drawer should have no effects, but also that he should have *no fair pretence for drawing*. Now he may have a fair pretence, as in the case of a "fair mercantile agreement," without having any funds in the hands of the drawee, which no-

tice of non-acceptance of the bill might enable him to withdraw; and yet in such case it would appear, from the language of the court, that notice could not be dispensed with.

"Where he draws only for the purpose of raising money by discount for himself, and *à fortiori* for the acceptor," notice need not be given.

Where he draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for repayment. There is no person on whom he can have a legal or an equitable demand, in consequence of the non-payment of the bill. But how can the same reasoning be said to apply *à fortiori* to the case of the bill being drawn for the use of the acceptor? In such case the relative situation of the parties must be substantially the same as if the money raised on the bill for the acceptor, were funds of the drawer in his hands, on which the bill was drawn. Every motive for requiring notice of non-payment, in the case of a bill drawn upon funds, except that which results from a right to claim those funds by a suit, would apply to a bill drawn to raise money for the acceptor, unless it was understood at the time that the acceptor was not to pay the bill.

The case of *Walwyn* v. *St. Quintin*, then, can only be supported on the idea of an understanding that the drawee was not to pay the bill, or that a bill, drawn, not in the usual course of business, is a transaction to which commercial rules do not apply.

*In the case of *Whitfield* v. *Savage*, (2 *Bos. & Pull.* 277.) the drawer had funds in the hands of the acceptor, and the decision turned upon that point. * 161

The reasoning on the cases of protested bills has been gone into the more at large, because it has been considered as applicable to promissory notes endorsed under the *statute of Anne*, which is admitted to be in force in Maryland.

The endorsor has been considered as the drawer, and the maker of the note as the acceptor; and in all cases of an endorsement for accommodation, the endorsor is likened to a drawer without funds in the hands of the acceptor.

Where the money raised upon the note is received

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by the endorsor, so that the note is discounted, in truth, for his accommodation, not for that of the maker, he is unquestionably without funds in the hands of the acceptor, must expect to pay the note himself, and cannot require notice of its non-payment by the maker. But the same reasons do not appear to exist where the note has been discounted for the maker. In that case the funds which represent the note are in the hands of the maker, or, to use the language applicable to bills, in the hands of the acceptor before the draft becomes payable; the drawer had a right to draw, and had a right to expect that his bill would be paid. Upon principles of reason and of justice, then, it would seem that notice of non-payment could be as little dispensed with in this case, as if he had himself paid the money to the maker of the note, and then received it from the bank, or as if the note had been given him for a previous debt, and had been discounted for his own use.

Notice of non-payment by the maker is necessary, because the undertaking of the endorsor is *conditional* and wherever, in fact, the transaction is such that the *maker* of the note ought in justice to pay it, and is bound ultimately to make it good, it would seem reasonable that payment should be demanded from him, and that reasonable notice of non-payment should be given to the endorsor.

*162 *If, however, the course of decisions be otherwise, the endorsor of a note for the accommodation of the maker must come within the exception which dispenses with notice in his case.

The cases which have been adjudged in England on promissory notes, are anterior, in point of time, to the cases of *Walwyn* v. *St. Quintin*, and of *Whitfield* v. *Savage*.

The first which has been cited is *De Berdt* v. *Atkinson*. This note was endorsed for the accommodation of the maker, the endorsor well knowing at the time that the maker was insolvent. Four judges who tried the cause were unanimously of opinion, that want of notice did not discharge the endorsor. The opinion of the *Chief Justice* was founded on the *known insolvency of the maker*, and the consequent impossibility that loss could be sustained by the endorsor from want of notice.

The opinion of Justice *Buller* was founded on the circumstance that the note was endorsed for the accommodation of the drawer. He states explicitly, that the general rule is only applicable to fair transactions, and by fair transactions he means "bills or notes given for value in the ordinary course of trade."

Justices *Heath* and *Rooke* accorded in the decision, but whether for the reasons assigned by the *Chief Justice*, or for those assigned by Justice *Buller*, or for both, does not appear.

The same point came on to be considered in the case of *Nicholson* v. *Gouthit*.

This was a strong case, because the endorsement was made in consequence of a previous engagement on the part of the endorsor to guaranty the payment of a debt due from the maker of the note, who appears, from the transaction, to have been in bad circumstances at the time, and who became insolvent before the note was payable. From his connection with the maker, and from other circumstances, the endorsor must have known that the maker would not pay the note, and it was the *understanding of all parties that it should be paid by the endorsor. * 163

The justice of the case was said to be clearly in favour of the plaintiff, and under an impression that the want of notice in this case could not injure the plaintiff, the *Lord Chief Justice* had at the trial instructed the jury that it was unnecessary, and indeed that it might be considered as received by anticipation.

In this case the note was not made merely to raise money, but was made to pay a debt. The endorsor, however, gave no value for it, and, if likened to the drawer of a bill of exchange, he had drawn without funds in the hands of the acceptor, and with a knowledge that the acceptor would not pay the bill.

But in the argument in favour of a new trial, the counsel contended that the law upon a promissory note was different, in this respect, from the law on a bill of exchange, and though notice of the dishonour of a bill drawn without funds in the hands of the drawee need not be given, yet the rule in the case of *promissory notes* is totally different, and notice must in all cases be given to the endorsor.

In delivering the opinion of the court, Lord Chief

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Justice *Eyre* assented to this distinction, and admitted the rule with respect to notice to the endorsor to be as stated. He, therefore, reversed his own decision at *Nisi Prius*, and granted a new trial upon the strict law, contrary to his ideas of the justice of the case.

Heath and *Rooke* concurred in this opinion. *Buller* was not present, and, reasoning from his opinion in the case of *De Berdt* v. *Atkinson*, it is probable he would not have concurred in the decision of this case.

However, then, the law may be with regard to the drawer of a bill of exchange who from other circumstances may fairly draw, but who has no effects in the hands of the drawer, it seems settled in England, by the case of *Nicholson* v. *Gouthit*, that the law with regard to a promissory note is different, and that, if in
* 164 *any case where the note is made for the benefit of the maker, notice to the endorsor can be dispensed with, it is only in the case of an insolvency known at the time of endorsement.

In point of reason, justice, and the nature of the undertaking, there is no case in which the endorsor is better entitled to demand strict notice than in the case of an endorsement for accommodation, the maker having received the value.

This court is of opinion that the circuit court erred in directing the jury that the *laches* of the plaintiffs, in failing to demand payment of the maker of the note, and to give notice of non-payment to the endorsor, did not deprive the plaintiffs of their remedy against the endorsor, and, therefore, the judgment rendered in this case is reversed, and the cause remanded for further trial. A new trial, with instructions, &c.

Judgment reversed.

HOPKIRK *v.* BELL.

The act of limitations of Virginia is no bar to a British creditor's demand on a promissory note, dated 21st August, 1772, although one of the plaintiffs was in the country after the treaty of peace, viz. in 1784, and remained here until his death in 1785.

THIS case was again *certified* from the circuit court for the district of Virginia.

It appeared upon the trial, in addition to the facts stated in the former report of the case,(a) that Andrew Johnston, one of the partners of the house, trading under the firm of Alexander Spiers, John Bowman, & Co. of whom the plaintiff is the surviving partner, came to this country after the treaty of peace in 1783, viz. in the spring of 1784, and died here in 1785, but that no other partner of the firm has been in this country at any time since the treaty of peace.

C. Lee, for the plaintiff, cited 3 *Dall.* 240. 242. 281. *Ware* v. *Hylton.*

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The Court ordered it to be certified as their opinion that, under ALL the circumstances stated, the act of limitations of Virginia was not a bar to the plaintiff's demand on the note of 21st August, 1772.

(a) See ante, vol. 3. p. 454.

HICKS ET AL. *v.* ROGERS.

In Vermont, *tenants in common* may maintain a *joint* action of ejectment.

THIS was a case certified from the circuit court for the district of Vermont, the judges of that court(a) being opposed in opinion upon the question, whether the plaintiffs, devisees of a tract of land *to be equally divided between them*, could, under the will, support a *joint* action of ejectment. The declaration did not set forth the title of the plaintiffs, otherwise than by the following averment. "Of which tract or parcel of land, the plaintiffs, on the 6th day of April, in the year of our Lord Christ, one thousand eight hundred and four, *were well seised and possessed in their own right*, and so continued thereof possessed until the 8th day of April, in the year last aforesaid, when the defendant, without law or right, and contrary to the will of the plaintiffs, thereinto

(a) The honourable W. Paterson, late associate justice of the supreme court of the United States, and the honourable Elijah Paine, district judge.

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entered and ejected, expelled, drove out and amoved the plaintiffs therefrom, and ever since hath, and still doth keep out the plaintiffs from the premises, taking the whole profits to himself, which is to the damage of the plaintiffs six hundred dollars, *to recover which* and the quiet and peaceable possession of the said premises, and just costs, they bring this suit."

Bradley, (of Vermont,) for the plaintiffs, contended,

1st. That by the common law *of Vermont*, the words "equally to be divided between them" do not make a tenancy in common, because a tenancy in common is not thereby necessarily implied. Joint heirs in Vermont hold as coparceners.

* 166 *2d. That if the plaintiffs are tenants in common, yet they have a right, by the common law, to maintain a joint action for an injury to their lands holden in common. (3 *Bac. Abr.* 216.)

3d. That even if the plaintiffs are to be considered as tenants in common, and could not by the common law join in an action to recover possession, yet by the statute of Vermont of 2d of March, 1797, (*Laws of Vermont*, p. 118. s. 88.) they must join in an action for the mesne profits, or rather no other action is given for the mesne profits than an action for the possession itself, in which the plaintiffs shall recover the possession as well as damages.

The words of the act are, "and in every such action," (ejectment,) "if judgment be rendered for the plaintiff, he shall recover as well *his damage* as the seisin and possession of the premises." As, therefore, the action for the mesne profits cannot be severed from the action of ejectment, and as, upon every principle of law, tenants in common must join in the action for the mesne profits, it follows that they must join in the possessory action also.

The principle has also been admitted by the legislature of Vermont, by the act of *29th of October*, 1806, s. 4. which declares, "that tenants in common of any lands, &c. may join in any action which concerns their common interest in such land."

There was no argument on the part of the defendant.

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The Court decided that the action was well brought, and that the will ought to be received in evidence to support the declaration.

*THE UNITED STATES v. ZEBULON CANTRIL.

The act of congress of 27th of June, 1798, *to punish frauds committed on the bank of the United States*, is in itself repugnant, and will not support an indictment for knowingly uttering as true, a false, forged, and counterfeit paper, *purporting* to be a bank bill of the United States, signed by the president and cashier.

THIS case was *certified* from the circuit court of the district of Georgia, the opinions of the judges of that court being opposed upon a motion in arrest of judgment, upon a verdict of *guilty* on the following indictment, viz.

"The jurors," &c. "upon their oath present that Zebulon Cantril, late," &c. on the 1st of January, 1806, "with force and arms, at the house of one William Gibson, in the town of St. Mary's," &c. "a certain false, forged and counterfeit *paper*, partly written and partly printed, *purporting to be a bank bill of the United States for ten dollars, signed by Thomas Willing, president, and G. Simpson, cashier*, dated at Philadelphia, the second day of September, one thousand eight hundred and four, payable on demand to R. Beatty or bearer, with force and arms, did feloniously utter and publish *as a true bank bill of the United States*, with intent to defraud the said William Gibson, and which said false, forged and counterfeit bill, partly written and partly printed, is in the words, figures and letters following, to wit:" (here the bill was inserted:) "he the said Zebulon Cantril," "at the said time of uttering and publishing the said false, forged, and counterfeit bill, partly written and partly printed, there by him in form aforesaid, well knowing the same so by him uttered and published to be false, forged and counterfeited, against the form of the statute in that case made and provided, and against the peace and dignity of the United States."

The reasons assigned in arrest of judgment were,

1. That the indictment is insufficient and repugnant, inasmuch as it charges the prisoner with having uttered and published as true, a certain *false*, forged, and counterfeit paper, partly written and partly printed, *purporting* to be a bank bill of the United States for ten dollars, *signed* by Thomas Willing, president, and G. Simpson, cashier, &c.

*2. Because the act of congress, passed the 27th of June, 1798, entitled "*An act to punish frauds committed on the bank of the United States*," (vol. 4. p. 152.) under which the prisoner is indicted, or so much thereof as relates to *168

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the charge set forth in the indictment, is inconsistent, repugnant, and, therefore, void.

The words of the act of congress, so far as they describe the offence charged, are as follows, viz.

"If any person shall utter or publish, as true, any *false*, forged, or counterfeited bill or note *issued by order of the president, directors and company of the bank of the United States, and signed by the president, and countersigned by the cashier thereof*, with intention to defraud the said corporation, or any other body politic or person, knowing the same to be falsely altered, forged or counterfeited, every such person shall be deemed and adjudged guilty of felony, and being thereof convicted, according to the due course of law, shall be sentenced," &c.

The question was submitted without argument.

February 28.

MARSHALL, Ch. J. delivered the opinion of the court that the judgment ought to be arrested, for the reasons assigned in the record, and directed the opinion to be certified accordingly.

The same order was *made* in the case of *The United States* v. *Baylis*, for a similar offence.(*a*)

(*a*) An act of congress was passed at the session 1806—1807, to amend the law in this respect.

* 169 *STHRESHLEY & OBANNON *v.* THE UNITED STATES.

A collector of the revenue of the United States, after removal from office, has no authority to collect the duties outstanding at the time of his removal, and which had accrued while he remained in office, but this power and duty devolves upon his successor.

THIS was an action of debt, brought by the United States in the district court of Kentucky district for the penalty of an official bond given by Sthreshley, with Obannon as his surety, dated the 13th of September, 1796, the condition of which was, "that whereas the said Thomas Sthreshley is appointed, under the acts of congress laying duties upon spirits distilled within the United States, and upon stills, a collector of the revenue which shall or may arise, by virtue of the several acts of congress; to be computed from the first day

of July, 1796, and to continue until revoked by the supervisor within the counties of Fayette and Clarke, being the first division of the first survey of the district of Ohio.

"Now if the said Thomas Sthreshley, his heirs, executors or administrators, shall well and truly superintend the several distilleries and stills, and collect all other duties by law required of him, as mentioned in his said commission, in his division; shall do and perform all the several duties which by law is or shall be required to be done at or within the same; shall collect the duties arising thereon according to law, and duly account for and pay the same to the supervisor of the said district, or some other officer of the United States duly authorized; then this obligation to be void, or else to remain in full force and virtue."

The defendants pleaded, 1st. General performance; and, 2dly. That the appointment of Sthreshley was revoked on the 1st of July, 1797, and that he faithfully executed and discharged all the duties of his said office according to law, accruing from the said 1st day of July, 1796, until the 1st day of July, 1797, inclusive, and all things relative thereto.

The breach, assigned in the replication, was, that Sthreshley "did not well and truly account for and pay to the supervisor of the district in his said obligation * 179
mentioned, or to any other officer of the United States duly authorized to receive the same, the several duties arising and accruing within his said division during his continuance in office, under the laws of the United States and his said commission, and which, by virtue of the said obligation and commission, the said laws of the United States did require him to account for and pay over; but hath failed therein and is in arrear to the said United States in the sum of *two thousand one hundred* and *seventy-one dollars* and *twenty-nine cents*, and *three fourths of a cent*;" upon which breach an issue was tendered and joined; upon the trial whereof a bill of exceptions was taken by the defendants to the refusal of the court to admit evidence that at the time of the revocation of his commission, there were outstanding and uncollected by him duties to the amount of 2,285 *dollars* and 83 *cents* which had accrued during his continuance in office, and which constituted part of

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the account charged against him, and for the balance whereof the present suit was brought; and that the defendant had delivered over to his successor in office true accounts of the said outstanding duties, for collection.

This evidence was rejected under the opinion that the defendant, although his commission was revoked, had authority, and was in law bound, to collect all the outstanding duties which had accrued during his continuance in office.

The verdict and judgment in the court below, being in favour of the United States, the defendants brought their writ of error.

H. Marshall, for the plaintiffs in error, suggested a doubt whether the bond was not void, inasmuch as there was no law of the United States which authorized the supervisor to demand it, or required the officer to give it.

JOHNSON, J. How can that question arise upon the plea of *performance*?

H. Marshall. If the bond is totally void, it will not support a judgment under any form of pleading. He did not, however, mean to press the objection.

* 171 *The principal question, viz. whether the power of the officer to collect the outstanding duties which had accrued while he was in office, ceased with his removal, was submitted without argument.

Rodney (*Attorney-General*) referred the court to the laws of the United States, vol. 1. p. 304. s. 5, 6. 16.; vol. 2. p. 82.; vol. 3. p. 80. 421.; and vol. 4. p. 194.

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MARSHALL, Ch. J. delivered the unanimous opinion of the court, that the power of the officer to collect the outstanding duties ceased upon his removal from office, and devolved upon his successor. A contrary construction would be extremely injurious to the revenues of

the United States, and could not have been intended by the legislature. Sthreshley v. United States.

The officer can only be liable to pay over the money he has collected, unless he is charged with a neglect of duty in not collecting.

In the present case the breach assigned is for not *paying*, and no breach is assigned in not *collecting*, the duties. The bill of exceptions shows that the defendant Sthreshley had paid over and accounted for all the duties he had collected.

Judgment reversed.

*HUMPHREY MARSHALL AND WIFE *v.* JAMES CURRIE. *172

ERROR to the district court of Kentucky, in a suit in chancery in which the plaintiffs in error were the original complainants. The bill complained that the defendant had obtained an elder patent for land covered by the complainants' elder entry, and prayed that the defendant might be compelled to convey to them the legal title.

Loose and vague expressions in an entry of land in Kentucky, may be rendered sufficiently certain, by the reference to natural objects mentioned in the entry, and by comparing the courses and distances of the lines with those natural objects.

The only question was, whether the entry, under which the complainants claim, described the land with sufficient certainty. It was in these words: "Number two hundred and forty one, Thomas Marshall enters two thousand acres of land on part of a military warrant, number one thousand three hundred and forty-nine, beginning on the bank of Green River *two hundred poles above a beech tree marked* D. L. standing on the bank of the river, a few *poles* below the mouth of a branch, and *a small distance* above the place called *Glover's*, upon the opposite side of the river, thence running south seventy-five degrees east, one thousand poles, thence north, twenty-five degrees west, and from the beginning up the meanders of the river, and binding thereon so far that a line parallel to the first shall include the quantity. Entered August the sixth, one thousand seven hundred and eighty-four."

The material facts found by the jury, according to

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the practice of Kentucky, were, that the complainants' entry was made on the 6th of August, 1784, and the defendant's on the day following. That the defendant's patent bears date on the 14th of June, 1787, and the complainants' patent on the 3d of June, 1796, and that both patents include part of the same land. That the *Green River*, and the place called *Glover's*, were notorious by those names before, and at the time of the complainants' entry. That the watercourse delineated on the plat, by the name of *Big Branch*, is a branch
* 173 running *into Green River, 596 poles above the place called *Glover's*, and on the opposite side of the river, and existed at the time of the entry. That the beech tree represented in the plat, stands on the bank of Green River, 18 poles below the mouth of the *Big Branch*, " and is a very conspicuous tree; and that the letters D. L. were marked *at or near* said tree, *upon a beech*, about November or December, one thousand seven hundred and eighty three;" that the beginning corner of the complainants' survey is on the bank of Green River, 200 poles next above the said beech tree, marked on the plat. That two other watercourses empty into the Green River; one called Clover lick creek, below the *Big Branch*, and nearer to *Glover's;* the other called *Embro's Spring Branch*, above the *Big Branch;* both of which are laid down on the connected plat. The jury also found that there is a small *branch or drain* about 250 yards long, running all the year, between Clover lick creek and the lower line of the plaintiffs' survey, besides those represented on the plat. That beech abounds all along the bank of Green River, opposite to *Glover's Station*, and for a considerable distance below and above, except immediately above and below the mouth of the small branch or drain, and that there was no *proof* that there was any beech tree marked D. L. standing on the 6th of August, 1784, (the date of the complainants' entry,) upon the bank of Green River a few poles below the mouth of a branch, as described in the complainants' entry.

For the plaintiffs in error, *H. Marshall* contended, that the entry was sufficiently definite in its description of the location, within the meaning of the act of Virginia. The *Green River* and *Glover's* were objects notorious,

and respecting which there is no dispute. The *branch* referred to in the entry, as being a *small distance* above *Glover's*, is found at the distance of 596 poles, which was a reasonable distance, according to the decisions in the cases of *Johnson* v. *Naul*, *Craig* v. *M'Craken*, and *Moore* v. *Watkyns*, in *Sneed's Reports*, pages 390. 393. 397. 404, 405.

*It is contended, that it does not appear that the letters D. L. were on the tree on the 6th of August, 1784. But the jury have found that those letters were marked on *a beech, at or near* the tree in question, in December, 1783, from whence a presumption arises that they remained on the tree until the 6th of August following, unless the contrary be shown. For although the jury have found that there was *no proof* of their being on the tree, on the 6th of August, yet they have not found that they were not, nor have they found any fact to rebut the presumption arising from the existence of the letters a few months before. The jury must have meant to say that there was no positive and conclusive proof, otherwise their last finding contradicts their first finding, for the presumption arising from the actual existence of the letters, *is proof* until that presumption be removed. *174

"*At, or near*," means *at*, unless the contrary is shown. *Sneed*, 120. *Crow* v. *Bannon*.

But if the letters were not on the tree, there is still sufficient certainty in the location. Green River and Glover's are admitted to be certain, but it is said the branch is uncertain, inasmuch as there are two other branches falling into Green River, not far from Glover's. But *Clover lick creek* is out of the question, because the course of the river at that place will not answer to the calls of the entry. *Embro's Spring Branch* is further from Glover's than the *Big Branch*, and the nearest branch which will satisfy the location ought to be taken. The *small branch or drain*, mentioned by the jury, is not located on the plat, and therefore we cannot say where it ought to be placed. But the jury have found that beech trees do not abound immediately above and below it, and, therefore, it is not probable that that was the branch referred to by the entry.

The courts in Kentucky have always endeavoured to sustain an entry, if by reasonable construction it be possible. For this purpose they will reject an absurd or

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superfluous call, they will supply a word, they will consider a call not proved as expunged, and although there are more allegations than are proved, yet if enough is proved to render the entry sufficiently certain, the court will support it.

* 175 *To support these positions, he cited the cases of *Consella* v. *Briscow*, *Kenton* v. *M'Connel*, and *Pawling* v. *Merewether*, from *Hughes's Reports*, p. 15, 16. 45. 169. and *Gaither* v. *Tilford*, *Morgan* v. *Robinson*, *Bradford* v. *Allen*, *Craig* v. *Jones*, *Craig* v. *M'Craken*, and *Brown* v. *Johnson*, from *Sneed's Rep.* p. 184. 278. 101. 331. 54. 52. 60.

H. Clay, for the defendant in error, contended, that the beginning of the location was uncertain, and therefore that the whole entry was void. It does not appear that the letters D. L. ever were marked on the tree, nor that they existed on any tree at the time of the entry. The whole language of the entry is uncertain. "A *few* poles," "a *small* distance," "a *branch*," are expressions too vague to support an entry.

What is uncertain in point of *fact*, is not a subject of construction by the court. To support the complainants' entry, the court is now called upon not to give a construction of law to the words of the entry, but to make a new entry in point of fact.

Identity, notoriety, natural objects, are all wanting.

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JOHNSON, J. delivered the opinion of the court.

In the argument of counsel in this case, the only point which has been thought necessary to dwell upon, is the legal certainty of the complainants' entry. Pursuing the principle that a plaintiff must recover upon the strength of his own title, and not on the weakness of his adversary's, the defendant has not entered into any discussion relative to the sufficiency of his claim to the land in question. The circumstances constituting what in the courts of Kentucky are denominated the calls of the complainants' entry, are, *Glover's Station*, *Green river*, *a marked tree on the bank of the river*, *and a branch emptying itself into the river*. The two former are notorious, and the inquiry is, can the others be sufficiently ascertained with relation to them. We are of opinion that they

can. The only objection that can be made to the *identity of the tree and branch with relation to which the complainants have made their survey, and the actual distance of those objects above Glover's Station, the uncertainty attendant upon calling for a tree of which a large number grow along the banks of the river, and the existence of another stream emptying itself into the same river nearer to Glover's Station, and which it is contended will answer the call.

These difficulties, we are of opinion, are all removed by considering the courses called for by the complainants with relation to the courses of the river.

Above Glover's Station, and until you reach the bend of the river above which the complainants' entry is surveyed, the course of the river is east and west. It there assumes a different direction, and its course is north and south. By surveying the entry at the point where the complainants have located their land, it assumes a shape adapted to the course of the river. At any point below where it is situated, and until you reach the place called Glover's Station, it is impossible that it can be located. This circumstance is sufficient, in our opinion, to establish the branch which was called for, as it is the first you meet with above the bend; and when that is ascertained, there is no longer any difficulty in locating the complainants' land.

The jury find that the tree called for is very conspicuous, and that previous to the date of the complainants' entry a tree very near the spot where that is situated was marked D. L. Although a tree of a particular species, at a distance not precisely limited, may be uncertain where that tree abounds, the impression of a certain mark upon such a tree is a sufficient identification, when accompanied with the other circumstances of this case, which might have been resorted to by a subsequent locator to prove the identity of this tree.

In giving this opinion the court is not uninfluenced by an anxiety to save the early estates acquired in that country. Such was the laxity of the rules upon which the rights of individuals depended under the land laws of Virginia, that this court feels a strong sense of the necessity of liberality in deciding upon the validity of entries. *177

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The court, therefore, reverses the decree of the district court, and decrees a conveyance, to be executed by the defendant to the complainants, of that part of the land contained in his patent which is included in the complainants' survey, and that each party pay their own costs.

Decree reversed.

VIERS AND WIFE *v.* MONTGOMERY.

A court of equity will not interfere between a donee of land by deed, and a devisee under a will of the donor, in a case where there is no fraud.

ERROR to the district court of Kentucky, in a suit in chancery brought originally by Montgomery against W. M. Viers and Patsy his wife, late Patsy Henly, to compel the latter to convey to the former the legal estate in certain lands in Kentucky, which one Ebenezer Brooks, since deceased, conveyed, by deeds dated the 10th of November, 1791, to the defendant's wife, while a widow, and which Brooks, by his last will, devised to the complainant Montgomery. The bill charged that the only consideration of the deeds from Brooks to Patsy Henly was, that she should "take him as her husband," which she refused to do, but intermarried with the defendant, W. M. Viers. It did not aver that the complainant was of kin to the deceased, or that he had any equitable claim other than as a devisee. Nor did it charge the defendant Patsy with any promise of marriage, or any breach of such a promise, nor with fraud in obtaining the deeds. The will of Brooks, referred to in the bill, calls the complainant his friend and *cousin*. The deeds were of bargain and sale in fee, and purported to be in consideration of 1,100*l.* Virginia currency, and contained a warranty against Brooks, and all claiming under him.

* 178 *The answer of the defendants denied that the consideration of the deeds was as stated in the bill, and avers that the defendant Patsy, although solicited, always refused to make any promise of marriage to the deceased; that he often pressed her to accept his land, which she for some time declined; that he declared he

did not expect any consideration, but wished her to receive it as a gift, and that he did not expect she would marry him.

It alleged that Brooks had boarded in her house some months, where he had been kindly and hospitably treated, without any charge being made against him, and suggested that this, together with the affection which he entertained for her, but which she always discountenanced, were his motives for giving her the land. That she at last, by the advice of her friends, accepted it, and that when he had executed the deeds he voluntarily declared himself to be fully satisfied, in the presence of the subscribing witnesses.

The facts found by the jury were, that the defendant Patsy, by her conduct to the deceased, induced him to suppose that she would marry him, and that this encouragement or inducement was the only consideration she gave for the land, except his boarding; but that she never made him any promise of marriage. That he had urged her to accept the land before she agreed to take it, and had declared to her that he did not expect to receive any consideration from her, but wished her to accept it as a gift; and that at the time he executed the deeds, he declared he did not expect that she would marry him. That she was advised by her friends to take the land before she agreed to accept it; and that, after the execution of the deeds, she offered to return to him the land, but he would not receive it.

That Brooks boarded in her house, and never paid her any thing therefor, except the land. The jury also found the will of the deceased, and the devise to the complainant.

The decree of the court below, upon argument, was, that the defendants should convey the land to the complainant, and that the complainant should pay the defendants the amount of Brooks's board, and the taxes which had been paid by the defendants, with interest.

*Which decree was, by this court, without argument, reversed, and the complainant's bill dismissed, with costs. * 179

Decree reversed.

DIGGS AND KEITH *v.* WOLCOTT.

A court of the *United States* cannot enjoin proceedings in a *state* court.

THIS was an appeal from a decree of the circuit court for the district of Connecticut, in a suit in chancery.

The appellants, *Diggs & Keith*, had commenced a suit at law against *Alexander Wolcott*, the appellee, in the *county court* for the county of Middlesex, in the state of Connecticut, upon two promissory notes given by *Wolcott* to one *Richard Matthews*, for the purchase of lands in Virginia, and by him endorsed to the appellants; whereupon *Wolcott* filed a bill in chancery in the *superior* court of the state, against the appellants *Diggs & Keith*, and also against *Robert Young* and *Richard Matthews*, praying that *Diggs & Keith* might be compelled to give up the two notes to be cancelled, or be perpetually enjoined from proceeding at law for the recovery thereof, &c.

This suit in chancery was removed by the *appellants* from the state court into the circuit court of the United States for the district of Connecticut, where it was decreed that *Diggs & Keith* should, on or before a certain day, deliver the notes to the clerk of the court, and in default thereof should forfeit and pay to *Wolcott* 1,500 dollars; *and that they should be perpetually enjoined*, &c. and that *Robert Young* should repay to the appellee the amount of principal and interest which the latter had paid on account of the purchase of the lands; and that the appellee should deliver up to the clerk the surveys of the lands, and the bond of conveyance; and in default thereof should pay to *R. Young* the sum of 20,000 dollars.

* 180 *The case was argued upon its merits by *C. Lee* and *Swann*, for the appellants, and by *P. B. Key*, for the appellee; but *the court* being of opinion that a circuit court of the United States had not jurisdiction to enjoin proceedings in a *state* court,

Reversed the decree.

WOOD *v.* LIDE.

ERROR to the circuit court for the district of Georgia.

The writ of error was dated the 23d of December, 1805, and returnable to February term, 1806; the citation also bore the same date, and commanded the defendant in error to appear at the same term. The writ of error was filed in the clerk's office of the court below on the same 23d of December. The judgment below was not signed until the 4th day of January, 1806. The writ of error was not returned and filed in the clerk's office of the supreme court until the 18th of March, 1806, after the court had closed its session.

If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered.

P. B. Key, for the plaintiff in error, suggested that in such a case the writ of error ought to be dismissed of course.

The Court, however, inclined to be of a contrary opinion, but informed Key that they would give him an opportunity to show the contrary.

On a subsequent day he contended that the writ could not be returned at any other term than that to which it was returnable, and to which the defendant in error had been cited to appear. After the expiration of the term it was void. The execution of a writ of error is the sending up the record according to its command, and to send the record up at another term is no execution of the writ.

*He relied upon the case of *Blair* v. *Miller*, *in this court*, 4 *Dall.* 21. as being decisive. * 181

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The *Chief Justice* stated that there had been some difference of opinion among the judges, which arose from their not understanding perfectly the facts of the case.

If the writ of error had been served when it was not

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in force, (that is, after its return day,) such service would have been void. But if served while in force, a return afterwards will be good.

The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. *Laws U. S.* vol. 1. p. 63. s. 23.

If it be so served before the return day, the service is good.

In the case cited from 4 *Dall.* it does not appear which party made the motion, nor whether there was an appearance for the opposite party.

In the present case, the writ of error having been served when in full force, and the writ of error returned although not at the first term, the appearance of the defendant in error has waived all objection to the irregularity of the return.

The judgment was affirmed.

☞ Note. *No notice was taken of the fact that the writ of error was served before the judgment below was signed.*

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

FEBRUARY TERM, 1808.

The following Judges attended at this term, viz.

THE HONOURABLE JOHN MARSHALL, CHIEF JUSTICE.
The honourable WILLIAM CUSHING,
The honourable SAMUEL CHASE,
The honourable BUSHROD WASHINGTON,
The honourable WILLIAM JOHNSON,
The honourable BROCKHOLST LIVINGSTON,
AND
The honourable THOMAS TODD,*
} ASSOCIATE JUSTICES.

CÆSAR A. RODNEY, Attorney-General.

* The appointment of Judge Todd was under the act of congress of 24th of February, 1807, directing that the supreme court should consist of a chief justice and six associate justices.

SUPREME COURT U. S.

FEBRUARY TERM, 1808.

FITZSIMMONS *v.* THE NEWPORT INSURANCE COMPANY.

Persisting in an intention to enter a blockaded port after warning, is not attempting to enter it.

Quære, whether a foreign sentence of condemnation be conclusive evidence in an action against the underwriters?

ERROR to the circuit court of the district of Rhode Island, in an action upon a policy of insurance on the brig *John*, warranted American property, from *Charleston, South Carolina*, to *Cadiz*, captured by a British ship of war on the 16th of July, 1800, carried into Gibraltar, and there condemned on the 26th day of August following. The cause of condemnation, set forth in the sentence, was, that the brig was "cleared out for *Cadiz*, a port actually blockaded," and that the master "*persisted in his intention* of entering that port, *after warning* from the blockading force not to do so, *in direct breach and violation of the blockade thereby notified*." On the trial in the court below, the jury found a special verdict, stating, among other things, that the blockade of Cadiz was not known at Charleston when the John sailed from thence, and that the first notice the master had was from the blockading squadron, who *brought to* the brig, and warned the master not to proceed to, nor attempt to enter, the port of Cadiz, and endorsed his register; but the master had no notice of such endorsement upon his register until after the condemnation. The mate and some of the seamen were taken out, and a prizemaster and British seamen put on board. She was detained by the *blockading squadron from the 16th to the 27th of July, when the master was ordered on board the admiral's ship, and told, "We have thoughts of setting you at liberty, and in case we do, and deliver you your vessel and papers, what

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course will you steer, or what port will you proceed for?" To which the master answered, that in case he got no new orders, he should continue to steer by his old ones. The admiral then said, "That will be, I suppose, for Cadiz." To which the master replied, "Certainly, unless I have new orders." Upon which the admiral said, "That is sufficient; I shall send you to Gibraltar for adjudication." Whereupon the brig, *without being liberated*, was sent into Gibraltar, and condemned on the grounds stated in the sentence. The libel and proceedings in the viceadmiralty are found by the special verdict. An appeal was prayed and granted from the viceadmiralty court, but it does not appear to have been prosecuted. The judgment in the court below was for the original defendants.

This cause was several times argued, having been pending in this court ever since the year 1803.

It was now argued by *Dallas* and *C. Lee*, for the plaintiff in error, and by *Rawle*, for the defendants.

Argument for the plaintiff in error.

1. The plaintiff is entitled in the present action to support his claim by the *truth* of the case, in opposition to the *falsehood* of the sentence.

2. The cause expressly assigned for condemning the vessel is not a lawful cause of condemnation, tested by the law of nations, or by the treaty between this country and Great Britain.

I. The question of conclusiveness of a foreign sentence of a court of admiralty, in a case of insurance, has never yet been settled in this court. It is *res integra*.

In a question of principle, and where this court is bound by no authority or precedent, it will take the path which leads to justice.

* 187 *1st. *How does it stand upon general principles?*

By what principle are we bound to enforce a foreign judgment? Not that of *comity* and reciprocity; for that would often be to sanction gross error and palpable injustice; but upon the principle of *public policy* and *convenience*, and this can extend no further than is necessary to quiet *the title to the thing* acquired under such a sentence. So far as the title to the thing itself

is concerned, a foreign sentence must be considered as conclusive, but no further. A foreign municipal judgment, when brought into our courts to be enforced, is only *prima facie* evidence; but when set up as a defence it is conclusive, because it is the decision of that tribunal to which the plaintiff has chosen to resort. It is, therefore, conclusive against him, but not in his favour.

Judgments upon attachments, which change the property of the thing attached, are conclusive as to the title of the thing, but not as to the question of debt between the principal creditor and debtor.

Why should a sentence of condemnation *as prize* be conclusive in a suit for indemnity against *capture?* Public policy is not concerned in the question whether the insurer or the insured should bear the loss.

The underwriter promises indemnity against capture and its effects, if the property be neutral. The assured warrants the *neutrality*, but *not the acquittal* in a foreign prize court. He is bound to sue, labour and travel for the benefit of the underwriter in this case as well as in others. But the loss by capture and condemnation is the very peril insured against; and all the assured is bound to do, is to prove that his property was really neutral; he does not take upon himself the risk of the injustice of foreign *courts*, any more than the injustice of any other department of a foreign government. What is it but the injustice of belligerent nations which makes a difference between a war risk and a peace risk upon neutral property? And what consolation is it to the insured that his property is lost by the injustice of a court, rather than by that of the executive power? All that is required of him is *good faith;* he does not *answer for the good faith of a foreign tribunal; a tribunal, too, whose decisions are professedly not founded upon the principles of abstract right, but upon the will of the sovereign. * 188

The capture alone gives the right to abandon, and, consequently, to recover for a total loss. The subsequent claim and litigation is, in truth, by and for the benefit of the underwriter. The assured is only bound to prove the neutrality in the suit between the underwriter and himself.

The doctrine that all the world are parties to a suit

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upon a question of prize is a *mere fiction*, and is never applied to any question but that of the title to the thing itself.

2d. How does the principle stand upon precedents of other nations.

Upon a question of general law, or the law of nations, we are not to look to the practice of one nation only. We are as much bound by the precedents of France, as we are by those of England since our revolution.

In *France*, we are told by Emerigon, the sentence of a foreign prize court is not conclusive upon collateral cases. It only protects the title to the property acquired under it.

In *England*, a system has been raised; but like an inverted cone, it rests only on a single point. The case of *Hughes* v. *Cornelius*, reported in 2 *Shower*, 232. *T. Raym.* 473. and *Skin.* 59. is the only basis upon which the fabric is erected. This case only decides, what we admit, that a foreign sentence is conclusive as to the title in the thing itself. This is the only reported case, prior to the revolution; and thus the question remained until the case of *Bernardi* v. *Motteux*, *Doug.* 575. which was decided in the year 1781. The point of that decision was, that a sentence of condemnation by a foreign court of admiralty was not conclusive evidence of a breach of the warranty of neutrality, if the sentence does not appear to have proceeded upon that ground. **Park*, p. 365. has given the result of all the cases, and deduces this general doctrine.

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1. "That wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties;" or

2. "Wherever the sentence is *general*, and no special ground is stated, there it shall be conclusive and binding, and the court here will not take upon themselves, in a collateral way, to review the proceedings of a *forum* having competent jurisdiction of the subject matter."

3. "But if the sentence be so ambiguous and doubtful that it is difficult to say on what ground the decision turned;" or,

4. "If there be colour to suppose that the court

abroad proceeded upon matter not relevant to the matter in issue, there evidence will be allowed in order to explain." And,

5. "If the sentence, upon the face of it, be manifestly against law and justice, or be contradictory, the insured shall not be deprived of his indemnity; because, to use the words of Mr. Justice *Buller*, any detention by particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance."

The counsel for the plaintiff commented at large upon the cases of *Salouci* v. *Johnson*, *Park*, 362. *Lothian* v. *Henderson*, 3 *Bos. & Pull.* 516. *Geyer* v. *Aguilar*, 7 *T. R.* 681. *Garrels* v. *Kensington*, 8 *T. R.* 230. *Calvert* v. *Bovill*, 7 *T. R.* 526. *Kindersly* v. *Chase*, in the cockpit, decided by Sir W. Grant, *Park*, 363. 5th ed. *Mayne* v. *Walter*, *Park*, 363. *Pollard* v. *Bell*, 8 *T. R.* 134. *Bird* v. *Appleton*, 8 *T. R.* 563. *Price* v. *Bell*, 1 *East*, 663. *Bearing* v. *Christie*, 5 *East*, 398. *Baring* v. *Clagett*, 3 *Bos. & Pull.* 212. and 8 *T. R.* 192. *Christie* v. *Secretan*, from all which they drew the conclusion that according to English precedents, which, however, they denied to be authorities in this court, except the *case of *Hughes* v. *Cornelius*, a foreign sentence of condemnation is not conclusive evidence of the want of neutral character, unless it proceeds upon a ground warranted by the law of nations, or by treaties between the countries of the captor and the captured. * 190

3d. As to *domestic precedents*, they are not decisive. In New-York the law is finally settled against the conclusiveness. 1 *N. Y. Cases in Error*, 7. 2 *N. Y. Cases in Error*, 217. 3 *N. Y. T. R.* 213. 240. But in the supreme court of Pennsylvania the question is still *sub judice*, as it is in most of the other states.

II. The cause expressly assigned for condemnation is not a lawful cause, either under the law of nations, or the treaty between this country and Great Britain.

The capture itself was a total loss, and gave the right to abandon. At the time of abandonment there was no restitution.

The sentence is not a decree of *enemy property*, nor generally as *lawful prize*, but it is a condemnation on

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special grounds. 1. That she was cleared out for Cadiz, a port actually blockaded; 2. That the master *persisted in his intention* of entering that port, after warning from the blockading force not to do so, in direct breach and violation of the blockade.

It is not stated that the blockade was known at the time of her sailing, nor that any *attempt* was made to enter Cadiz after notice. The special verdict finds that the blockade did not exist at the time of her sailing; and that after being verbally notified of the blockade, the vessel was at no time at liberty, so that she could have attempted to enter the port. That although the register was endorsed, yet the master had no knowledge of it until after his arrival at Gibraltar.

The offence charged is persisting in an intention to do what he had no power to do. This intention is inferred from the conversation between the master and the admiral, which is detailed in the special verdict, and which, on the part of the latter, was insi-
* 191 dious, and calculated to *entrap. From the effect of such conversations it was the duty of the court to protect the master. 1 *Rob.* 7. *The Mercurius.* The answer of the master was honest, simple and proper; "that in case he got no new orders, he should steer by his old ones." This was no more than his duty. Those new orders, if given by the admiral, would have been obeyed, and would have justified the master in his deviation.

But even an *intention* to violate a blockade, unless followed by some *act*, such as *sailing* with that intent, &c. is no cause of condemnation under the *law of nations*. *Maley* v. *Shattuck*, *ante*, vol. 3. p. 488. *The Betsey*, 1 *Rob.* 280. *The Spes and Irene*, 5 *Rob.* 76. *The Shepherdess*, 5 *Rob.* 235. *Vattel*, b. 3. s. 117. *The Vrow Judith*, 1 *Rob.* 128. *The Columbia*, 1 *Rob.* 130. *The Vrow Johanna*, 2 *Rob.* 91. *The Neptunus*, 2 *Rob.* 92. 95, 96. *The Appollo*, 5 *Rob.* 256. *The Columbia*, 1 *N. Y. Cases in Error*, 7. 1 *Rob.* 130. 3 *N. Y. T. R.* 226.

If the *intention* be not a cause of condemnation under the law of nations, much less is it under the British treaty, article 18. (*Laws U. S.* vol. 2. p. 484.) the words of which are, "And whereas it frequently happens that vessels sail for a port or place belonging to

an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, *after notice*, she shall again *attempt* to enter; but she shall be permitted to go to any other port or place she may think proper."

If condemned without an *attempt*, the sentence of condemnation is not warranted by the treaty, and, therefore, does not falsify the warranty of neutrality. 8 *T. R.* 434. *Pollard* v. *Bell.* 8 *T. R.* 562. *Bird* v. *Appleton.* 1 *East*, 663. *Price* v. *Bell.* 5 *East*, 398. *Baring* v. *Christie.* 1 *N. Y. Cases in Error*, 7. 3 *N. Y. T. R.* 226.

Argument for the defendants in error.

This court can only decide what the law is, not what it ought to be.

*We contend for three points. * 192

1. That the vessel was justly condemned for attempting to break the blockade.

2. That the sentence is conclusive evidence of the fact.

3. That the condemnation was the consequence of the improper act of the master, for which the underwriters are not liable.

1. The first point is not denied, if the fact be that there was an *attempt* to break the blockade.(a)

A verbal notice to the master was as good as if it had been in writing, because he could himself see that a blockade *de facto* existed.

An *attempt* is a conclusion from a variety of facts and circumstances. 1 *Bos. & Pull.* 185. A persisting in the intention after warning; a public open avowal of that intention when he had the offer of his liberty to go to any port but Cadiz, amounted to an attempt to break the blockade. The British squadron could not have suffered him to go off with such decla-

(a) *Rawle* offered to read the *depositions* and *evidence* contained in the proceedings of the viceadmiralty, which were referred to by the special verdict, and of which a copy was thereto annexed.

But *the court* stopped him, saying that the proceedings in the viceadmiralty court were only matter of evidence to the jury, into which this court could not look.

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rations. He had no right to demand orders from the British admiral, nor had the latter a right to give them. He could not direct him to what port to go. The master was bound to act according to his best discretion in such a case. The only orders which the British commander could give were not to go to Cadiz.

It was a continuance (after notice) of the original attempt to enter the port, which was made before notice. 1 *Rob.* 123. 5 *Rob.* 256.

2. The sentence is conclusive evidence against the plaintiff.

* 193 *This point is not now to be decided on principles of policy or comity, but upon principles of law long established and settled. It has been the fashion to consider this as a modern principle, fabricated upon national motives of interest since the revolution.

But it rests on principles of a much earlier date. It is found in existence at earlier periods, when the commerce of England was in its infancy. It is the application only which is modern.

In the "*case of copyhold leases*," 4 *Co.* 29. a. it was decided, that the sentence of the ecclesiastical court dissolving the marriage was conclusive evidence that the first marriage was void, and that the issue of the second marriage was legitimate. So in *Kenn's Case*, 7 *Co.* 42, 43. it was holden, "*that the sentence*" of the ecclesiastical judge "should *conclude* as long as it remained in force." So in *Buller's N. P.* 244. it is said, "In an action upon a *policy of insurance*, with a warranty that the ship was *Swedish*, the sentence of a *French* admiralty court condemning the ship as *English* property, was holden conclusive evidence. This case is taken from *The Theory of Evidence*, published in 1761, and, consequently, was before our revolution. It seems to be the first case noticed in the books, where the principle was applied to a case of insurance. The case of *Fernandes* v. *De Costa*, *Park*, 177, 178. was in the *4th year of George* III. long before our revolution. In that case the sentence of the French prize court was holden to be conclusive evidence in favour of the underwriter. The counsel cited also *Carth.* 225. *Jones* v. *Bow*, where the sentence of the spiritual court was holden to be conclusive. Also the *Duchess of Kingston's Case*, 11 *State Trials*, and the case of *Moses* v. *M'Pherlan*, 2 *Burr.* 1005. and *Walker* v. *Witter*,

Doug. 1. *Galbraith v. Neil, Doug.* 5. *in note. Lord Kaim's Principles of Equity*, 369—375.

Thus stood the cases before the revolution. The principle of law was fixed and general; and all the later decisions are but applications of the principle to particular cases. Once admit the case of *Hughes v. Cornelius* to be law, and the whole doctrine, to the extent *to which it has been carried in England, flows as a necessary consequence. As *between the parties* it is admitted to be conclusive, and as to *the title to the thing*, the question is at rest. The plaintiff in this case was *party* to the suit in the viceadmiralty at Gibraltar. *He* is bound by the sentence at all events, however it might be with regard to another person. As to him it has passed *ad rem judicatam.* If the property in the thing has passed, why not the title to its value? The title is as much gone from the underwriter as it is from the assured. He is equally precluded from the chance of recovery and from the benefit of the abandonment. By the *sentence* the property is changed. It is not by an act of arbitrary power, or of superior force, or by an act of legislation, but by the judgment of a court of *competent*, *peculiar*, and *exclusive* jurisdiction. For among nations, the court of the captor is as much a court of peculiar and exclusive jurisdiction of the question of prize, as the ecclesiastical courts are in England of ecclesiastical causes.

* 194

It is the adjudication of a court to whose jurisdiction he has submitted, by putting in his claim, and before which he was bound to support the neutrality of the property, in order to give him a right to recover against the underwriters. *They* do not undertake to support the neutrality of the property. That is entirely *his* business, and if he fails to do so, and by that means the property is lost, the loss must fall upon him.

It is of less importance *which way* the question is decided, than that it should be *settled.* When the law is once ascertained, merchants and underwriters will make their contracts accordingly, and provide against the effect of foreign sentences, if they think proper.

The warranty of neutrality necessarily refers to the decision of foreign *prize* courts. Neutrality is a question incident to that of prize, which can be tried only

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in a foreign court, because it can only be tried in a court of the belligerent captor, and our own courts are the courts of a neutral nation. Courts of prize are courts of the law of nations, and their decisions upon questions arising under the law of nations, are to be *195 *considered as the judgments of domestic courts. The question of neutrality is always expected to be agitated in a foreign tribunal. The underwriters do not take upon themselves the risk of condemnation for want of the neutral character, and it is to protect them from that risk that the warranty of neutrality is inserted. But if the sentence is conclusive to prevent them from all chance of recovering the property, and not conclusive in their favour against the claim of the assured, the warranty of neutrality would afford them no protection from the risk against which it was the understanding of the parties that they should be protected.

The counsel then went into an examination of the cases of *Rapalje* v. *Emory*, 2 *Dall.* 51. 231. *Penhallow* v. *Doane*, 3 *Dall.* 85. 88. 116., *Vasse* v. *Ball*, 2 *Dall.* 270. *Vandenheuvel's Case*, 2 *N. Y. Cases in Error*, 226. and *Maley* v. *Shattuck*, 3 *Cranch*, 488. to show that the general inclination of the courts in this country was in favour of the conclusiveness of a foreign sentence.

They also examined the cases of *Bernardi* v. *Motteux*, *Doug.* 575. *Barzillai* v. *Lewis*, *Park*, 358. *Salouci* v. *Woodmas*, *Park*, 360. *Geyer* v. *Aguilar*, 7 *T. R.* 681. *Christie* v. *Secretan*, 8 *T. R.* 192. *Kindersley* v. *Chase*, *Park*, 363. (o). *5th edit.* *Lothian* v. *Henderson*, 3 *Bos. & Pull.* 499. *Baring* v. *Royal Ex. Ins. Co.*, 5 *East*, 99. *Mayne* v. *Walter*, *Doug.* 363. *Pollard* v. *Bell*, 8 *T. R.* 434. *Bird* v. *Appleton*, 5 *T. R.* 562. *Price* v. *Bell*, 1 *East*, 663. and *Bolton* v. *Gladstone*, 5 *East*, 155. not only to show how far the doctrine has been extended in England, but to prove by the declarations of the judges that the principle, as applied to insurance cases, was adopted and undisputed before our separation from Great Britain.

3. The condemnation was the consequence of the improper act of the master, for which the underwriters are not answerable.

Underwriters are not liable for a loss proceeding from negligence or misconduct of the master, unless it amount

to barratry. *Park*, 24. 1 *Emerigon*, 364. 373. *401. 441. 2 *Valin*, 79. 7 *T. R.* 160. 4 *Dall.* 294. and the case of *Gray* v. *Myers*, MS.

Argument, in reply.

1. The master of the vessel made no *attempt* to enter Cadiz after notice. He never had the power, because he never had the possession of his vessel after the warning. An attempt consists of an *act* as well as of an *intent*. But here there is evidence of an *intent only*. All the cases cited show some act done with the intent to enter.

2. As to the question of conclusiveness; all the cases cited from 4 and 7 *Co.*, *Carthew*, and 2 *Burrow*, were *domestic* sentences. The case cited from *Bull. N. P.* and *The Theory of Evidence*, is of no authority. It does not appear when, nor where, nor by whom, it was decided. The book is anonymous, and refers only to the case of *Hughes* v. *Cornelius*, 2 *Shower*, 232. which does not support it. The case of *Fernandes* v. *De Costa* is not against us. There the sentence was supported by an answer in chancery of the plaintiff, and left to the jury by Lord Mansfield, with the other evidence; and the plaintiff was permitted to give evidence to show the ship was Portuguese, as warranted. The case of *Rapalje* v. *Emory* was a foreign attachment, and the only decision upon it was to give validity to the title of the property condemned. In the case of *Vasse* v. *Ball*, the court did not decide the sentence to be conclusive, but went into an examination of its merits.

The common law courts have exclusive jurisdiction of questions of insurance, and wherever the question of neutrality is necessarily involved in a question of insurance, they have as complete jurisdiction to try the question of neutrality, as a court of prize has. That court which has jurisdiction of the principal question, has necessarily jurisdiction of all incidental questions. The underwriter takes upon himself the risk of *unlawful* capture, and the court which is to decide upon his liability in the particular case, must necessarily decide whether the capture were lawful or not; and if found to be unlawful, the plaintiff must recover.

*3. No words of the master could amount to such conduct as would exonerate the underwriters. He did no act whatever. * 197

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February 8.

MARSHALL, Ch. J. (all the seven judges being present) delivered the opinion of the court as follows: viz.

This suit is instituted to recover from the underwriters the amount of a policy insuring the brig John, on a voyage from Charleston to Cadiz. The vessel was captured on her passage by a British squadron then blockading that port, was sent into Gibraltar for adjudication, and was there condemned by the court of vice-admiralty as lawful prize. The assured warrants the ship to be American property; and the defence is, that this warranty is conclusively falsified by the sentence of condemnation.

The points made for the consideration of the court are,

1. Is the sentence of a foreign court of admiralty conclusive evidence, in an action against the underwriters, of the facts it professes to decide? If so,

2. Does this sentence upon its face, falsify the warranty contained in the policy? If not,

3. Does the special verdict exhibit facts which falsify the warranty?

The question on the conclusiveness of a sentence of a foreign court of admiralty having been more than once elaborately argued, the court reluctantly avoids a decision of it at present. But there are particular reasons which restrain one of the judges from giving an opinion on that point, and another case has been mentioned, in which it is said to constitute the sole question. In that case, it will of course be determined.

* 198 *Passing over the consideration of the first point, therefore, the court proceeded to inquire whether this cause could be decided on the second and third points.

Admitting for the present that the sentence of a foreign court of admiralty is conclusive, with respect to what it professes to decide, does this sentence falsify the warranty contained in this policy, that the brig John is American property?

The sentence declares "the said brig to have been cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the king, and that the master of said brig persisted in his intention of entering that port, after warning from the blockading force not to do

so, in a direct breach and violation of the blockade thereby notified."

The sentence, then, does not deny the brig to have been American property. But it is contended by the counsel for the underwriters, that a ship warranted to be American is impliedly warranted to conduct herself during the voyage as an American, and that an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character.

This position cannot be controverted.

It remains, then, to inquire, whether the sentence proves the brig John to have violated the laws of blockade; that is, whether the cause of condemnation is alleged in such terms as to show that the vessel had forfeited her neutral character, or in such terms as to show its insufficiency to support the sentence.

The fact of clearing out for a blockaded port, is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offence; the persisting in the intention to enter that port, after warning by the blockading force, is the ground of the sentence.

Is this intention (evidenced by no fact whatever) a breach of blockade? This question is to be decided by *a reference to the law of nations, and to the treaty between the United States and Great Britain. * 199

Vattel, b. 3. s. 177. says, "All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever *attempts* to enter the place, or carry any thing to the besieged, without my leave."

The right to treat the vessel as an enemy is declared, by Vattel, to be founded on the *attempt* to enter, and certainly this attempt must be made by a person knowing the fact.

But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause:

"And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested; it is agreed that every vessel so circumstan-

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ced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall *again attempt to enter;* but she shall be permitted to go to any other port or place she may think proper."

This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it.

Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade from the departure of the

* 200 vessel. *Without giving any opinion on that point, it may be observed, that in such cases the fact of sailing is coupled with the *intention*, and the sentence of condemnation is founded on an actual breach of blockade. The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign court alone to determine whether the testimony supported the allegation that the blockade was broken. Had this sentence averred that the brig John had broken the blockade, or had attempted to enter the port of Cadiz after warning from the blockading force, the cause of condemnation would have been justifiable, and without controverting the conclusiveness of the sentence, the assured could not have entered into any inquiry respecting the conduct of the vessel. But this is not the language of the sentence. An attempt to enter the port of Cadiz is not alleged, but persisting in the intention, after being warned not to enter it, is alleged as the cause of condemnation. This is not a good cause under the treaty. It is impossible to read that instrument without perceiving a clear intention in the parties to it, that after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty it would appear that a second attempt, after receiving notice, must be made, in order to constitute the offence which will justify a confiscation. "It is agreed," says

that instrument, "that every vessel so circumstanced" (that is, every vessel sailing for a blockaded port, without knowledge of the blockade) "may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter."

These words strongly import a stipulation that there shall be a free agency on the part of the commander of the vessel, after receiving notice of the blockade, and that there shall be no detention nor condemnation, unless, in the exercise of that free agency, a second attempt to enter the invested place shall be made.

It cannot be necessary to state that testimony which would amount to evidence of such second attempt. Lingering about the place, as if watching for an opportunity *to sail into it, or the single circumstance of not making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offence, the offence itself is attempting again to enter, and "unless, after notice, she shall again attempt to enter," the two nations expressly stipulate "that she shall not be detained, nor her cargo, if not contraband, be confiscated." It would seem as if, aware of the excesses which might be justified, by converting intention into offence, the American negotiator had required the union of fact with intention to constitute the breach of a blockade. * 201

The cause of condemnation, then, as described in this sentence, is one which, by express compact between the United States and Great Britain, is an insufficient cause, unless the intention was manifested in such manner as, in fair construction, to be equivalent to an attempt to enter Cadiz, after knowledge of the blockade. This not being proved by the sentence itself, the parties are let in to other evidence.

However conclusive, then, the sentence may be, of the particular facts which it alleges, those facts not amounting, in themselves, to a justifiable cause of condemnation, the court must look into the special verdict, which explains what is uncertain in the sentence. The special verdict shows that the vessel was seized on her

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approaching the port of Cadiz, without previous knowledge of the blockade; that she never was turned away, and "permitted to go to any other port or place;" that she was "detained" for several days, and then sent in for adjudication, without being ever put into the possession of her captain and crew, so as to enable her either "again to attempt to enter" the port of Cadiz, or to sail for some other port; that while thus detained, the commander of the blockading squadron drew the captain of the John into a conversation which must be termed insidious, since its object was to trepan him into expressions which might be construed into evidence of an intention to sail for Cadiz, should he be liberated;

* 202 *that availing himself of some equivocal, unguarded, and, perhaps, indiscreet, answers on the part of the captain, the vessel was sent in for adjudication; and on those expressions was condemned.

This court is of opinion that these facts do not amount to an attempt again to enter the port of Cadiz, and, therefore, do not amount, under the treaty between the United States and Great Britain, to a breach of the blockade of Cadiz. The sentence of the court of vice-admiralty in Gibraltar, therefore, is not considered as falsifying the warranty that the brig John was American property, or as disabling the assured from recovering against the underwriters in this action, and the testimony in the case shows that the blockade was not broken.

The judgment of the circuit court is to be reversed, with costs, and it is to be certified to that court, that judgment is to be entered on the special verdict for the plaintiff.

Judgment reversed.

MARSHALL *v.* THE DELAWARE INSURANCE COMPANY.

ERROR to the circuit court for the district of Pennsylvania, in an action for a total loss, on a policy of insurance on the *Brig Rolla*, her cargo and freight.

The material facts stated, were, that the *Brig Rolla*, a neutral vessel, while prosecuting the voyage insured, was captured by a belligerent cruiser, and libelled as prize of war. On the 9th of July, 1806, a final sentence in favour of the vessel and cargo was passed, and on the 19th of the same month, about 1 o'clock P. M. restitution was made. On the 17th of July the assured in *New-York received information of the capture, and immediately gave orders to his agent in Philadelphia to abandon to the underwriters. In pursuance of these orders the offer to abandon was made on the morning of the 19th.

The judgment of the court below was for the defendants.

The right of the insured to abandon and recover for a total loss, depends upon the state of the *fact* at the time of the offer to abandon, and *not* upon the state of the *information received.*

* 203

The technical total loss arising from capture, ceases with a final *decree* of restitution, although that decree may not have been executed at the time of the offer to abandon.

Hopkinson, for the plaintiff.

The question in this case is, whether the plaintiff is entitled to recover for a *total*, or only for a *partial* loss.

The proceeds of the cargo have been received by the plaintiff, who sold the same for account of the underwriters, if they will receive them.

If the abandonment was made before the restoration in fact of the cargo to the captain on the 19th of July, the plaintiff has a right to recover for a total loss, according to the decision in *Rhinelander's Case*, at last term, (*ante*, p. 41.)

The plaintiff having shown a total loss, by the capture, it is incumbent on the defendants to show that the property was restored before the abandonment. On the 17th the plaintiff received information of the capture; on the 18th he wrote and put into the postoffice at New-York, the letter to his agent in Philadelphia, directing the abandonment to be made; on the 19th it was received in Philadelphia, and the abandonment offered. The abandonment must relate to the 18th, when

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the plaintiff wrote his letter and made his election to abandon. Abandonment is an *ex parte* act, and if the plaintiff has a right to abandon at the time when he elects and offers to abandon, the defendants are liable from that time. No consent is necessary on the part of the defendants. The plaintiff was bound from the date of his letter; and the defendants must be equally bound.

But although the property may have been in fact restored before the abandonment, if that restoration was unknown to the plaintiff, it is yet an undecided question, whether the abandonment is not valid.

*204 *The opinion of *Lord Mansfield* in *Hamilton* v. *Mendes*, unlike the opinions of that great man, is confused and contradictory, sometimes making the question of right to abandon depend upon the state of the information, and sometimes on the fact itself.

It is not reasonable that the insured should be bound to abandon upon receipt of the first intelligence, and yet the underwriter be permitted to take advantage of subsequent events. There would be no mutuality in this principle. It would be ruinous to merchants thus to be kept out of their money. Besides, the contract is for indemnity, and there can be no fairer mode of ascertaining the indemnity than to give the underwriters the thing itself, subject to the chance of recovery, and let them pay the price. If the thing is restored, and goes to a good market, the underwriters derive the benefit; if a loss happens, it is what they are bound by their contract to sustain. But as to the state of the fact itself, we contend that there was no actual restoration of the property before the offer to abandon. If there was, it is for them to show it. The *onus probandi* is on them.

If it is necessary to the justice of the case, the court will divide the day, and ascertain which event did first actually happen. 3 *Burrow*, 1434. *Combe* v. *Pitt*.

Dallas and *Rawle*, contra, contended,

That the peril being at an end, at the time of the offer to abandon, the plaintiff cannot recover for a total loss, unless the consequences of the capture created a total loss either in fact or in law.

The peril by capture was at an end on the 9th of July, when the final decree of restitution was pronounced in the court of *dernier* resort.

The right to restitution was consummate, and the authority to restore absolute. What remained was mere matter of form. The vessel and cargo were in the hands of the public officer, who held the same, after the decree, in trust for the owner. There was no longer any hostile or adverse possession. The property was in no danger of condemnation, or even of further detention.

*The state of the *fact*, and not of the *information*, is the test of the right to abandon. If intelligence were the test, any idle vague rumour might compel the underwriters to pay a total loss when the property was in fact in perfect safety the whole time. *205

The contract is, that the property shall not *perish* by the peril, not that it shall not *encounter* the peril. A storm may injure it, but if the injury does not exceed half the value, and the voyage be not broken up, it is not a total loss. The underwriters are only bound to pay the partial loss. It is a contract of indemnity only; the liability of the defendants, therefore, must depend on the state of the fact, and not of the intelligence. *Park*, 77. 155. 160. 144, 145, 146. 148. 152. 156. 167. *Esp. Ca. N. P.* 237. *M'Masters* v. *Shoolbred. Rhinelander* v. *Ins. Co. of Pennsylvania*, (*ante*, p. 42.) *Dutilgh* v. *Gatliff*, cited in *Rhinelander's Case*, 1 *N. Y. Cases in Error*, 21, 22. 1 *Johns. Rep.* 205.

It is not contended that the consequences of the capture created a total loss, either in fact or in law. The expenses, pillage, and damage did not amount to more than one fourth of the insured value, and these the underwriters are willing to pay. The vessel arrived at her destined port. She performed the voyage insured.

Ingersoll, in reply.

It is said that the restitution is to be considered as referring back to the time of the decree; but that point was otherwise decided in the case of *Dutilgh* v. *Gatliff*, in the supreme court of Pennsylvania. It was there decided that although at the time of the offer to abandon, there was a decree of restitution, yet as that decree was not known to the party who offered to aban-

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don, and as in fact the property was then in possession of the captors, the insured had a right to recover for a total loss.

February 23.

MARSHALL, Ch. J. after stating the facts of the case as above, delivered the opinion of the court as follows:

* 206 *The question submitted to the consideration of the court is this: is the assured entitled to recover for a partial or for a total loss?

In support of the claim for a total loss, two points have been made:

1st. That the state of information at the time of the abandonment, not the state of the fact, must decide the right of the assured to abandon.

If this be otherwise, then, it is contended,

2d. That the right to abandon is coextensive with the detention, which continued until restitution was made in fact, and that restitution in fact, though made on the same day, was posterior in point of time to the abandonment.

1. Does the right to abandon depend on the fact, or on the information of the parties?

The right to abandon is founded on an actual or legal total loss. It appears to the court to consist with the nature of the contract, which is truly stated to be a contract of indemnity, that the real state of loss at the time the abandonment is made, is the proper and safe criterion of the rights of the parties. Might they depend absolutely on the state of information, a seizure which scarcely interrupted the voyage might be, and frequently would be, converted into a total loss, and the contests respecting the real state of information might be endless. Intelligence of capture and of restitution might be received at the same time, and the insured might suppress the one and act upon the other.

This point came under the consideration of the court in the case of *Rhinelander* v. *The Insurance Company of Pennsylvania*, in which case it was said, that "where a belligerent has taken full possession of a vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss." The court, in delivering this opinion, understood itself

to require, that the continuance of the possession *up to the time of the abandonment, or a technical total loss incurred notwithstanding the restoration, was necessary to justify a recovery as for a total loss.

In considering the second point, the court proceeded to inquire whether the technical total loss on which the right to abandon depended, was terminated by the decree of restitution, or continued until that decree was carried into execution, and restitution was made in fact.

The real object of the policy is not to effect a change in property, but to indemnify the insured. Whenever, therefore, only a partial loss is sustained by one of the perils insured against, the original owner of the property retains it, prosecutes his voyage, and recovers for his partial loss.

But the voyage may be really broken up, without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage. This is a peril insured against, and of its continuance no certain estimate can be made. In the case of capture it is, for the time, a total loss, and no person can confidently say that the loss will not finally be total. So of an embargo. Its duration cannot be measured, and it may destroy the object of the voyage. These detentions, therefore, are, for the time, total losses, and they furnish reasonable ground for the apprehension that their continuance may be of such duration as to break up the voyage, or ruin the assured, by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justifying an abandonment, and a recovery for a total loss.

But when a final decree of restitution, from which it is admitted that no appeal lies, has been awarded, the peril is over. On no reasonable calculation can it be supposed that such a delay of restitution will ensue, as from that time to break up the voyage. There is no reason to presume a subsequent detention on the part of *the foreign prince. There is no motive for such detention. The master of the captured vessel may perhaps not be ready to receive possession, and the delay may proceed from him. At any rate, without some evidence that the peril was not actually deter- *208

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mined, the court cannot consider it as continuing after the sentence was pronounced. A technical total loss originates in the danger of a real total loss. The court cannot suppose such a danger to have existed after a final sentence of acquittal, unless some order of court relative to a reconsideration could be shown, or it should appear that some other delays were interposed by the court which had pronounced the sentence, or by the sovereign of the captor.

Had the facts on which this question depends been known at New-York and Philadelphia as they occurred, could it have been said that there existed a technical total loss? After a decree of restitution, could it be said that while means were taking to carry that decree into execution, while the mandate for restitution was passing from the court to the vessel, the assured had a right to elect to consider his vessel as lost, and to abandon to the underwriters? To this court it seems that the right to make such an election, at such a time, would be inconsistent with the spirit of the contract, and that the technical total loss was terminated by the decree of restitution, unless something subsequent to that decree could be shown to prove the continuance of the danger, or of an adversary detention.

Nothing in this opinion is intended to extend to the case where a cargo may be lost, without the loss of the vessel.

There is no error in the judgment of the circuit court of Pennsylvania, and it is to be affirmed, with costs.

Judgment affirmed.

* 209 *M'ILVAINE *v.* COXE'S LESSEE.

On the 4th of October, 1776, the state of New Jersey was completely a sovereign and independent state, and had a right to compel the inhabitants of the state to become citizens thereof.

A person born in the colony of New Jersey before the year 1775, and residing there until the year 1777, but who then joined the British army, and ever since adhered to the British, claiming to be a British subject, and demanding and receiving compensation from that government, for his loyalty and his sufferings as a refugee, has a right to take lands by descent, in the state of New Jersey.

THIS cause was now argued again by *Duponceau* and *Ingersoll*, for the plaintiff in error, and by *Rawle* and *E. Tilghman*, for the defendant.

The report of the former argument(*a*) having been so full, it is deemed unnecessary to state more of the argument, at this term, than will be sufficient to show the points to which additional authorities were adduced.

For the plaintiff in error, it was contended,

1. That Daniel Coxe was born *an alien to the state of New Jersey;* and when the revolution commenced, had a right to choose his side in a reasonable time, and could not be made a citizen of the new state against his will. Upon this point were cited 2 *Dall.* 234. *Coignet* v. *Pettit.* 2 *Rutherforth*, 30. 1 *Bl. Com.* 212. 3 *Dall.* 225. *Ware* v. *Hylton.* *Plowden on Alienage*, 3, 4. 7. 15. 19. 24. 119. *Laws of the U. S.* vol. 7. p. 147.; vol. 3. p. 165.; vol. 6. p. 80.

2. That even if he could, contrary to his *natural* allegiance, be compelled by force to become a citizen of the new state, his consequent allegiance to such new state could be *temporary* only, and could not exist longer than the pressure of the force existed. He had a right to escape from that force, and to throw off that allegiance, if he could. *Natural* allegiance, *i. e.* the allegiance due from birth, is the only kind which, by the rule of the common law, cannot be shaken off. *Voluntary* allegiance, by naturalization, and, *à fortiori*, allegiance imposed by force, is not perpetual. No *fiction* can make a *natural born subject.* 7 *Co.* 13. 38. 19. *Vaughan*, 280. *Craw* v. *Ramsay.* 1 *Bl. Com.* 369. 5 *Vesey*, jun. 781. *Somerville* v. *Somerville.* *Zouch, de Jure inter Gentes*, 144. *ed.* 1659. *pars* 2. s. 2. n. 16.

*It was also contended that the doctrine relied upon from *Calvin's Case* was an extrajudicial *dictum*, and even upon the principal point of that case, the judgment of the court was influenced by the known wishes of King James. To shake the authority of that case, the counsel cited *Collectanea Juridica*, 16. 3 *Biographia Brittanica, art.* COKE. 5 *Co.* 40. b. *Rapin's Hist. Eng. anno* 1606, 1607. *Hume's Hist. Eng. anno* 1604. *Hargrave's Introduction to the case of the Postnati.* 11 *State Trials*, 75. *Id.* 85. *Lord Bacon's Speech.* 1 *H. H. P. C.* 68. 11 *State Trials*, 106. *Lord Elles-* *210

(*a*) *Ante*, vol. 2. p. 230. *Feb. term*, 1805.

mere's Opinion. Sir Robert Phillips's Speech in 2d part of Car. I. anno 1628. *Stat. de prerogativa regis, anno* 1324.

On the part of the *defendant in error*, it was contended,

1. That whatever might be the principles of natural law, the state of New Jersey was sovereign and independent, and had a right to legislate upon the subject of allegiance, and to declare who were the citizens from whom it was due.

That by the principles of the common law, Daniel Coxe had a right to inherit lands in New Jersey.

In support of these points the following authorities were cited. 1 *Bl. Com.* 366. 370. *The Laws of New Jersey of the 20th September*, 1777, *and 29th of December*, 1781. *A manuscript opinion given by Lord Kenyon, on the 19th of February*, 1784, *while he was at the bar, that the American antenati were entitled to hold lands in England.* The case of *Hamilton* v. *Eden*, decided by Ch. J. *Ellsworth*, in North Carolina, stated in the printed account of the proceedings of the commissioners under the British treaty. The case of *Dr. Ingles*, stated in the same proceedings. *Plowden on Alienage*, 19. *Laws of New Jersey*, 28*th September*, 1782. *Vattel, Preliminary Discourse*, s. 9. 21. 24, 25. *Grotius*, b. 2. c. *5. s. 24. 3 *Dall.* 153. 162. and *Brown's Case, in Scotland, as stated by Mr. C. Lee.*(a)

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(a) The case was stated by Mr. Lee, as follows:

Alexander Brown, born in Virginia, where he always lived, and where he died on or about the year 1802, was the eldest brother in the elder line, of a numerous family, some of whom always lived in Scotland. By the death of a collateral relation in Scotland since his death, the descent of a landed estate was cast, and the question arose whether the eldest son of Alexander Brown, born since the year 1784, or his sisters, born before the treaty of peace, or the eldest son of William Brown, the second brother, born before the treaty of peace in Virginia, where he always has lived, or the relations of the intestate in Scotland, who always lived there, and were real British subjects, or any of them, inherited the estate.

Upon a contestation of these rights, it was determined in the court of competent jurisdiction, lately in Scotland, that the estate descended to the eldest son of Alexander Brown, under the statute of Anne, and the treaty of 1794. The cause was carried by appeal to the superior court, who affirmed the sentence in his favour. By his guardian the young man is now in receipt of the annual income. This decision was made about two years ago.

CHARLES LEE.

February 4th, 1808.

February 23.

CUSHING, J. delivered the opinion of the court, as follows.(*a*)

The court deems it unnecessary to declare an opinion upon a point which was much debated in this cause, whether a real British subject born before the 4th of July, 1776; who never from the time of his birth, resided within any of the American colonies or states, can, upon the principles of the common law, take lands by descent in the United States; because Daniel Coxe, under whom the lessor of the plaintiff claims, was born in the province of New Jersey, long before the declaration of independence, and resided there until some time in the year 1777, when he joined the British forces.

Neither does this case produce the necessity of discriminating very nicely the precise point of time when *Daniel Coxe lost his right of election to abandon the American cause, and to adhere to his allegiance to the king of Great Britain; because he remained in the state of New Jersey, not only after she had declared herself a sovereign state, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to, the new government. The court entertains no doubt that after the 4th of October, 1776, he became a member of the new society, entitled to the protection of its government, and bound to that government by the ties of allegiance. * 212

This opinion is predicated upon a principle which is believed to be undeniable, that the several states which composed this union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time

(*a*) *Johnson*, J. did not vote upon this question; and *Todd*, J. gave no opinion, as he had not been present at the argument.

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they were enacted. We do not mean to intimate an opinion that even a law of a state, whose form of government had been organized prior to the 4th of July, 1776, and which passed prior to that period, would not have been obligatory. The present case renders it unnecessary to be more precise in stating the principle; for although the constitution of New Jersey was formed previous to the general declaration of independence, the laws passed upon the subject now under consideration were posterior to it.

Having thus ascertained the situation of Daniel Coxe, on the 4th of October, 1776, let us see whether it was in any respect changed by his subsequent conduct, in relation to the new government. Without expressing an opinion upon the right of expatriation as founded on the common law, or upon the application of that principle to a person born in the state of New Jersey, before its separation from the mother country, we think it conclusive upon the point, that the legislature of that
* 213 state *by the most unequivocal declarations, asserted its right to the allegiance of such of its citizens as had left the state, and had not attempted to return to their former allegiance.

The act of the 5th of June, 1777, contains an express declaration that all such persons *were subjects of the state*, who had been seduced by the enemy *from their allegiance*. The law speaks of them as *fugitives* not as *aliens*, and they are invited, not to *become subjects*, but to *return to their duty*, which the legislature clearly considered as still subsisting and obligatory upon them.

The inquiry which the jury is directed to make, by the act of the 18th of April, 1778, in order to lay a foundation for the confiscation of the personal estates of these fugitives is, whether the person had, between the 4th of October, 1776, and the 5th of June, 1777, joined the armies of the King of Great Britain, *or otherwise offended against the form of his allegiance to the state*. The 7th section of this law is peculiarly important, because it provides not only for past cases, which had occurred since the 5th of June, 1777, but for all future cases, and in all of them the inquiry is to be, whether the offender has joined the armies of the

king, or otherwise offended against the form of his allegiance to the state.

During all this time, the real estates of these persons remained vested in them; and when by the law of the 11th of December, 1778, the legislature thought proper to act upon this part of their property, it was declared to be *forfeited* for their *offences*, not *escheatable* on the ground of *alienage*. This last act is particularly entitled to attention, as it contains a legislative declaration of the point of time when the right of election to adhere to the old allegiance ceased, and the duties of allegiance to the new government commenced. Those who joined the enemy between the 19th of April, 1775, and the 4th *of October*, 1776, (when an express declaration upon the subject was made,) and who had not since returned and *become subjects in allegiance to the new government*, by taking the oaths of abjuration and allegiance, are pronounced guilty of high treason, not for the purpose of affecting them personally, which would have *been most unjust; but *214
with a view to the confiscation of their estates. And consistent with this distinction, the jury are to inquire in respect to these persons, not as in the case of those who had left the state after the 4th of October, 1776, whether they had offended against the form of their allegiance, but whether they are offenders within this act, that is, by having joined the enemy between the 19th of April, 1775, and the 4th of October, 1776, and not having returned and become subjects in allegiance to the state.

Having taken this view of the laws of New Jersey upon this subject, it may safely be asserted that prior to the treaty of peace, it would not have been competent, even for that state to allege alienage in Daniel Coxe in the face of repeated declarations of the legitimate authority of the government, that he continued to owe allegiance to the state, notwithstanding all his attempts to throw it off. If he was an alien, he must have been so by the laws of New Jersey; but those laws had uniformly asserted, that he was an offender against the form of his allegiance to the state. How, then, can this court, acting upon the laws of New Jersey, declare him an alien? The conclusion is inevitable, that, prior to the treaty of peace, Daniel Coxe was entitled to

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hold, and had a capacity to take lands, in New Jersey by descent.

But it is insisted that the treaty of peace, operating upon his condition at that time, or afterwards, he became an alien to the state of New Jersey in consequence of his election, then made to become a subject of the king, and his subsequent conduct confirming that election. In vain have we searched that instrument for some clause or expression, which by any implication could work this effect.

It contains an acknowledgment of the independence and sovereignty of the United States, in their political capacities, and a relinquishment on the part of his Britannic majesty, of all claim to the government, propriety and territorial rights of the same. These concessions amounted, no doubt, to a formal renunciation of all claim to the allegiance of the citizens of the United States. But the question who were at that period
* 215 citizens of the *United States is not decided, or in the slightest degree alluded to, in this instrument; it was left necessarily to depend upon the laws of the respective states, who in their sovereign capacities had acted authoritatively upon the subject. It left all such persons in the situation it found them, neither making those citizens, who had by the laws of any of the states been declared aliens, nor releasing from their allegiance any who had become, and were claimed, as citizens. It repeals no laws of any of the states which were then in force and operating upon this subject, but on the contrary it recognises their validity by stipulating that congress should recommend to the states, the reconsideration of such of them as had worked confiscations. If the laws relating to this subject were at that period, in the language of one of the counsel, temporary and *functi officio*, they certainly were not rendered so by the terms of the treaty, nor by the political situation of the two nations, in consequence of it. A contrary doctrine is not only inconsistent with the sovereignties of the states, anterior to, and independent of, the treaty, but its indiscriminate adoption might be productive of more mischief than it is possible for us to foresee.

If, then, at the period of the treaty, the laws of New Jersey which had made Daniel Coxe a subject of that

state were in full force, and were not repealed, or in any manner affected, by that instrument, if by force of these laws he was incapable of throwing off his allegiance to the state, and derived no right to do so by virtue of the treaty, it follows that he still retains the capacity which he possessed before the treaty, to take lands by descent in New Jersey, and, consequently, that the lessor of the plaintiff is entitled to recover.

Judgment must be affirmed, with costs.

*THE UNITED STATES *v.* THE BRIG UNION, THE SLOOP SALLY AND CARGO, AND THE SLOOP DEBORAH AND CARGO. *216

THESE were three separate libels against these three vessels, which were seized by the collector of the district of Delaware for a supposed breach of the revenue laws. The sentence of the court below being in favour of the claimants, the United States appealed.

It is incumbent upon the *plaintiff in error* to show that this court has jurisdiction of the case.

Broom, for the appellees, objected to the jurisdiction of this court, because there was no rule to consolidate the cases, and in neither of them separately did the value of the thing in dispute, exclusive of costs, appear to be 2,000 dollars.

This court will permit *viva voce* testimony to be given of the *value* of the matter in dispute.

Reed, United States Attorney for the district of Delaware, said it was incumbent on the claimants to show the value, as they had submitted to the jurisdiction below.

The appraisement made by order of the district judge by three sworn appraisers, is not conclusive evidence of the value, but it is better evidence than the opinion of a single witness examined *viva voce* in open court.

But *the court* said that the *plaintiff in error* must show that *this* court has jurisdiction. The circuit court can neither give nor take away the jurisdiction of this court. This court must judge for itself of its own jurisdiction.

After deciding the question of *value* upon the weight of the evidence, the court will not continue the cause for the party to produce further evidence as to the *value*.

United States v. Brig Union.

A witness was then introduced in behalf of the United States, who was sworn and examined *viva voce* in open court to prove the value.

Broom, for the appellees, read from the record an appraisement, made by three sworn appraisers, by order of the district judge, by which the brig Union was appraised at 1,800 dollars, the sloop Sally at 400, and the sloop Deborah at 600, and contended that this appraisement being made by order of the judge, was conclusive evidence of the value of the matter in dispute, although that appraisement was never acted upon by the claimants
*217 *giving caution so as to liberate the vessels, which was the reason of the order for appraisement, according to the 89th section of the revenue law, vol. 4. p. 428. But if it should not be deemed conclusive evidence, yet it is better evidence than the opinion of a single witness who now forms a judgment from his recollection of the vessels two years ago. It is the testimony of three persons who formed their judgment at the time from an actual view and examination of the property. It was returned to the court and filed and entered upon record, without any objection on the part of the United States.

Rodney, Attorney-General, contra.

If the court below cannot by any act oust this court of its jurisdiction, much less can any of its officers or appraisers. If this valuation be conclusive, it puts it in the power of appraisers appointed by the court below to deprive this court of its jurisdiction.

MARSHALL, Ch. J. The appraisement is not conclusive evidence of the value, but in this case it is the best evidence. It was made by officers of the court under its order, and was regularly returned and filed. It does not impeach the credibility of the witness now examined, for the value is a matter depending upon opinion, and with respect to which the judgments of men may honestly vary. The appraised value would have been the matter in dispute if the property had been delivered up to the claimants upon security given.

Todd, *Livingston*, *Washington*, *Chase* and *Cushing*, Justices, concurred.

JOHNSON, J. contra. The appraisement was a thing not perfected. It was not acted upon, and might have been impeached. United States v. Brig Union.

The appeals were all dismissed for want of jurisdiction in this court.

No objection was made to the *viva voce* examination of the witness as to the value.

*On the next day, *218

Rodney, Attorney-General, moved the court for a continuance of these causes, and leave to take affidavits respecting the value of the property, so as to sustain the jurisdiction. This court has only decided that its jurisdiction does not appear upon the record. It is like the case of *Course* v. *Stead's Executors*, 4 *Dall.* 25. where the court continued the cause, and suffered affidavits to be taken to show the value of the matter in dispute. If the court should be of opinion that the decision of yesterday upon the weight of testimony differs this case from that of *Course* v. *Stead's Executors*, they will reject the motion.

Broom, contra.

If this motion had been made yesterday, before the decision of the court upon the weight of testimony, perhaps it might have been proper, but after the parties have put themselves on trial upon the evidence then before the court, and the decision has been made, it is not usual to open the case and grant a new trial, unless new evidence is suggested to have been discovered since the trial, not known to the party at the time of trial.

MARSHALL, Ch. J. Cannot the United States sue out a new writ of error, and take new affidavits to show the cause to be within our jurisdiction? If so, perhaps the court would not put the United States to that expense.

Rodney apprehended it would be final, it being an *appeal*, and not a writ of error.

The Court overruled the motion.

*PAWLING AND OTHERS *v.* THE UNITED STATES.

Upon a demurrer to evidence, the testimony is to be taken most strongly against him who demurs, and such conclusions as a jury might justifiably draw, the court ought to draw.

A bond may be delivered as an *escrow*, by the surety, to the principal obligor.

If one of the obligors, at the time of executing the bond, in the presence of some of the other obligors say, "We acknowledge this instrument, but others are to sign it," this is evidence from which the jury may infer a delivery as an *escrow*, by all the obligors who were then present.

ERROR to the district court for the district of Kentucky, in an action of debt upon an official bond given by *Ballinger*, as collector of the revenue, and signed and sealed by *Pawling*, *Todd*, *Adair*, and *Kennedy*, as his sureties, who pleaded that they delivered the same as an *escrow* to *one Joseph Ballinger*, to be safely kept; upon condition, that if *Simon Ingleman* and *William Patton*, named on the face of the bond, should execute the same as *cosureties*, then the bond should be delivered to *James Morrison*, supervisor, on behalf of the United States, as their deed, and not otherwise; and that the same never was executed by *Ingleman* and *Patton*; yet *Ballinger* delivered it to *Morrison*, on behalf of the United States, *and so not their deed.* The delivery as an *escrow* being traversed by the United States, issue was thereupon joined; in the trial of which the United States demurred to the evidence produced on the part of the defendants, which consisted of the depositions of T. T. Davis, W. G. Bryant, one of the subscribing witnesses, Elijah Stapp, another subscribing witness, John P. Wagnon, another subscribing witness, and a letter from Morrison, the supervisor, to Ballinger. The deposition of Davis states a conversation between Ballinger and Pawling, some time before the signing of the bond, in which the former told the latter that Todd, Kennedy, Shelby, Knox, Ingleman, Logan, Lewis, and Adair, had agreed to be security for him; upon which Pawling also agreed to become his security, but upon the express condition that the other persons also should join in the bond. It also states a subsequent conversation between the deponent and Todd, before signing the bond, in which the latter denied that he had agreed to become Ballinger's surety, but said that he should not be apprehensive of danger, if all the men whom Davis had named would join in the bond. The deposition of Bryant states that he saw Pawling, in the presence of Ballinger, sign the bond, on condition *that Kennedy, Todd, Adair, Davis, and others, whom the witness did not recollect, should

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also sign the bond; and he understood that Pawling was to be exonerated if they did not. The deposition of Elijah Stapp states that he saw Pawling, in the hearing of Ballinger, acknowledge the bond as his act and deed, upon condition that others mentioned should also sign it. The deposition of Wagnon states, that when Todd, Adair and Kennedy signed the bond, Todd, in the presence of the other two, after inserting in the bond the names of other persons who he said were to sign it, called upon the witness to take notice that others were to sign it, and said, "We acknowledge this instrument of writing, but others are to sign it." The letter from Morrison to Ballinger says, "I have received your favour by Mr. Davidson, who carries back your bond; not that I require more securities, but that you appeared anxious to have more; those who have already signed are very sufficient." It was admitted by the attorney for the United States, that the names of Thomas Kennedy, John Adair, Simon Ingleman, and William Patton, inserted in the body of the bond as obligors, were in the hand writing of the defendant Todd. This evidence upon the demurrer was, by the court below, adjudged insufficient. The defendants, the sureties, took a bill of exceptions to the refusal of the court to suffer *Ballinger*, the principal obligor, to be examined as a witness for them, they having severed in their pleas. But as that question was not decided by this court, it is deemed unnecessary to state the arguments of counsel on that point.

Pope, for the plaintiffs in error.

Upon a demurrer to evidence, it is a general rule of law, that the evidence must be taken most strongly against the party demurring; and that the court ought to infer every thing which a jury could reasonably have inferred from the testimony. *Doug.* 134. (*3d ed.*) *Cocksedge* v. *Fanshaw.* 2 *Wash.* 210, 211. *Stephens* v. *White.*

In the present case, there can be no question as to the defendants, Pawling and Todd; the only possible doubt *which can be raised is, whether the testimony of Wagnon supports the pleas of Adair and Kennedy. *221

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Rodney, (Attorney-General,) for the United States, contended,

That the delivery as an *escrow* ought to have been to a third person, and not to Ballinger, the principal obligor.

Pope, in reply.

The *law* of the plea is admitted by the joining of issue upon the *fact*. No exception can be taken to the legality of the defence, if the facts of the plea are found to be true. Courts ought to lean against demurrers to evidence, because they take the cause from the jury, which is the proper tribunal to decide the *facts* of the case, and throw that burden upon the court, whose only duty it is to decide the *law*. Demurrers to evidence are also extremely inconvenient in practice, especially demurrers to parol testimony, which consume a vast deal of time.

February 27.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

In this case two points are made for the consideration of the court.

It is contended by the plaintiffs in error,

1st. That judgment on the demurrers to evidence should have been rendered for the defendants in the court below.

2d. That Joseph Ballinger ought to have been admitted as a witness.

The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs,

* 222 *and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw.

The point in issue between the parties was the delivery of the instrument on which the suit was instituted. The plaintiffs below contending that it was delivered, absolutely; the defendants that it was delivered as an *escrow*.

The bond, upon its face, purports to be delivered absolutely; and it is not to be doubted that obligees would be much more secure against fraud, if the evidence that the writing was delivered as an *escrow* appeared upon its face, than by admitting parol testimony of that fact. But the law is settled otherwise, and is not to be disturbed by this court.

The subscribing witnesses to the bond were examined to prove its delivery. Henry Pawling executed it at one time; the other defendants, Kennedy, Todd, and Adair, at a different time. With respect to Pawling, the testimony is as complete as can be required. William G. Bryant deposes that Pawling signed the bond, on condition that other persons, whom he named, should also sign it. The witness understood that if those other persons should not sign it, Pawling should be exonerated. Elijah Stapp, the other subscribing witness to the signature of Pawling, deposed that "he saw Pawling acknowledge it as his act and deed, upon condition that others, whom he mentioned, should also sign it."

These are the subscribing witnesses to the bond, and certainly a jury believing them could not have avoided declaring, by their verdict, that the bond was delivered on condition. That condition not having been performed, the bond, as to Pawling, remains an *escrow*.

The testimony, with respect to the other defendants, is less positive. The witness, John P. Wagnon, was *called in to attest the bond. Thomas Todd, one of the defendants, then sat down and inserted in the body of the bond the names of other persons who, he said, were also to execute the instrument which he then held in his hand. * 223

Some distinction was taken at the bar between the case of Todd and that of the other defendants. But the court is of opinion that no such distinction exists. The other defendants said nothing. They did not even acknowledge their signatures. Todd holding the instrument in his hands, called upon the witness to take notice that "we" (in the plural) "acknowledge this instrument, but others are to sign it." The two other obligors being present, and making no other acknowledgment, are clearly to be considered as speaking through Todd, and executing the bond on the terms on

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which he executed it. Their condition, then, is the same. It is either an *escrow* or a writing obligatory with respect to all of them.

A jury might certainly have found the issue in favour of the plaintiffs below, and a court would have been well satisfied with their verdict. But might they not, without going against evidence, have found the issue in favour of the defendants below.

When words are to be proved by witnesses who depend on their memory alone, the precise terms employed by the parties will seldom be recollected, and courts and juries must form their opinions upon the substance and upon all the circumstances. Now to what purpose did the defendants call upon the subscribing witness to take notice that others, as well as themselves, were to execute the writing? To what purpose did they qualify their acknowledgment with this declaration? It could not be in order to show that they depended on Ballinger to procure additional securities, for that was an affair between him and them, of which it was perfectly unnecessary to call on the witness to take notice, if it was to have no influence on the particular fact he was required to attest. There is certainly strong reason for believing that the obligors considered that declaration
* 224 as *explaining and affecting the act with which they connected it.

It is also of some importance that the defendant Todd had previously declared that he should not be apprehensive of becoming a security for Ballinger provided others, whom he named, should also become securities, and that he inserted the names of others in the bond, in the presence of the witness.

Although the judges who compose this court might not, perhaps, as jurors, be perfectly satisfied with this testimony, they cannot say that a verdict would not be received, or ought not to be received, which should find the issue in favour of the defendants below. They cannot say that such a verdict would be against evidence. Thinking so, the court is of opinion that the judgment on the demurrer ought to have been in favour of the defendants below.

It is unnecessary to give any opinion on the second point. The judgment of the court for the district of Kentucky is to be reversed.

Judgment reversed.

GRANT *v.* NAYLOR.

ERROR to the circuit court for the district of Maryland, in an action of *assumpsit* brought by John and *Jeremiah* Naylor against *Daniel* Grant.

The verdict and judgment below were for the plaintiffs on the *second count* of the declaration, which stated, in substance, that it was agreed between the plaintiffs and defendants, that if the plaintiffs would at the request of the defendant sell and deliver to a John Hackett and *Alexander* Grant "divers goods, wares and merchandises," he, *the defendant, in consideration of the same, promised to pay the plaintiffs as much money as *they reasonably deserved* to have therefor, in case Hackett & Grant did not pay for them; and that, in consideration of the defendant's promise, and at his request, they sold and delivered to Hackett & Grant "divers goods, wares and merchandises," and reasonably deserved to have therefor 2,168*l.* sterling, of which the defendant and Hackett & Grant had notice; and which Hackett & Grant did not pay, but refused, and are insolvent; of all which the defendant had notice, and in consideration of the premises promised to pay the plaintiffs the said sum of 2,168*l.* sterling of the value, &c. which he has failed to do.

A letter of credit addressed by mistake to *John* and JOSEPH, and delivered to *John* and JEREMIAH, will not support an action by John and *Jeremiah* for goods furnished by them to the bearer, upon the faith of the letter of credit. It is not a written contract between the plaintiffs and the defendant, and *parol* proof cannot be admitted to make it such. It is not a case of *ambiguity*, or of *fraud*, or of *mistake* on the part of the plaintiffs.

Upon the issue of *non assumpsit*, the plaintiffs read in evidence a letter, admitted to be signed by and with the name of the defendant, and directed "To Messrs. John and *Joseph* Naylor & Co." in the following words:

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"*Baltimore*, 6*th April*, 1795.

"Gentlemen,

"By the recommendation of Mr. Travis, I take the liberty to address you by my son Alexander, who visits England with a view of establishing connections in the commercial line there in the different manufactories and others. He is concerned with Mr. John Hackett,

Semb. That the certificate of commissioners named in a *dedimus*, that they took in due form of law the oath annexed to the commission, is sufficient evidence of that fact.

That it is not necessary to give notice to the opposite party of the time and place of executing the commission.

That if the return of the commissioners be enclosed in an envelop which is sealed by the commissioners, no other sealing by the commissioners is necessary.

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of this place, under the firm of Hackett & Grant. For their plan I refer to themselves. Have therefore only to add, that I will guaranty their engagements, should you think it necessary, for any transaction they may have with your house."

The plaintiffs also produced and offered to read in evidence a commission, (with interrogatories, and an exhibit and depositions,) directed to two persons, in the usual form, commanding them to take the examination of the witnesses in writing upon the interrogatories, and to send them to the court *closed up and under the seals* of any two or one of them, and requiring them to
* 226 take the *oath annexed to the commission, but not directing before whom, or in what manner, the oath should be taken.

The depositions under this commission, went to prove that there was no commercial house at Wakefield, (the town where the plaintiffs lived,) under the name of John and *Joseph* Naylor & Co. That the firm of the plaintiffs was John and *Jeremiah* Naylor & Co. and that the Mr. Travis, mentioned in the letter, was the agent of the plaintiffs. That the letter was in fact intended for that house, and was delivered to it by Alexander Grant, of the house of Hackett & Grant, who obtained goods upon the credit of it, and who became insolvent.

To the reading of this commission and depositions the defendant objected, contending that the commission was illegally and defectively executed; but the court below overruled the objection, and suffered them to be read.

The defendant then prayed the court to instruct the jury, that upon this evidence the plaintiffs were not entitled to recover upon either count in the declaration; but the court refused, and instructed the jury that the evidence was *proper and legal* to *support* the issue on the part of the plaintiffs, and *sufficient in law for that purpose*, if by the jury believed to be true, and if they should believe that the letter was intended to be addressed, *and was addressed*, by the defendant to the plaintiffs.

To which opinions of the court the defendant excepted, and brought his writ of error.

Martin, for the plaintiff in error.

1. The first bill of exceptions brings into view the informality of the execution of the commission to examine witnesses. The authority to issue such a commission, and the mode of executing it, depend upon the act of assembly of Maryland, passed at *November session*, 1773, c. 7. s. 7. by which it is enacted, "that *such* commission shall issue, and the commissioners shall be appointed and *qualified, and *such* interrogatories be proposed or exhibited, and such commission be *executed and returned*, and the depositions or affidavits taken in pursuance thereof, shall be published in the same manner and form, as in the case of a commission issuing out of the court of chancery for the examination of witnesses residing and living out of this province; and the depositions or affidavits which shall be duly made or taken in virtue of any commission which shall issue in pursuance of this act, or copies thereof duly attested, shall be admitted in evidence at the trial of the cause." * 227

The mode of issuing and executing commissions from the court of chancery in Maryland has always been conformable to the English practice, except that, by the *act of assembly of* 1785, c. 72. s. 15. the parties are permitted to be present at the examination, and may put additional interrogatories.

1st. We object to the execution of the commission, because it does not appear that the commissioners were sworn according to law. They themselves certify that they took the oath annexed to the commission, but do not say before whom, nor in what manner. It ought to have been certified by some person who administered the oath, and who was competent in law to administer it; and such certificate ought to show *how* it was done. It is like the case of a commission to ascertain the boundaries of lands, in which case it has been uniformly holden in Maryland, that if the commissioners only return that they have acted according to law in general terms, their return is insufficient. They must certify in what manner they have executed their commission, that the court may judge whether it be legally executed.

2d. The commissioners were only authorized to ex-

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amine witnesses upon the interrogatories sent out with the commission. But it does not appear that any interrogatories were sent with the commission.(a)

* 228 *3d. The defendant had no notice of the time and place of executing the commission. He filed no interrogatories. Notice is required by the principles of natural justice, and by the constant practice of the court of chancery. 1 *Harrison's Ch. Prac.* 444.

4th. The return of the commissioners ought to have been under seal.

LIVINGSTON, J. Was not the envelop under their seals?

Martin. Yes; but that is not sufficient; they ought to have put their seals to their certificate.

LIVINGSTON, J. I have never seen any other seal to the return of commissions than the seal to the envelop.

5th. *Martin.* The commission was taken out upon the *first* issue which was made up, and before the *second* issue upon the amended pleadings,(b) upon which the cause was finally tried.

LIVINGSTON, J. Did not the old declaration contain a count like the second count of the new, upon which the verdict was found?

Martin. Upon filing a new declaration, it is to be considered as a new case altogether. *Eq. Ca. Abr.* 490. vol. 2. pt. 1. pl. 5. *new edition.*

2. The second bill of exception draws in question the applicability of the evidence to the counts of the declaration, and its sufficiency to support the plaintiffs' action. The verdict, being for the plaintiffs upon the second count only, confines the inquiry to that count.

(a) *Harper.* The rule of the court below is, that no commission shall issue until ten days after interrogatories filed. It is to be presumed that the clerk did not disobey the rule of court. The commissioners have returned the interrogatories with the depositions.

(b) On the first trial a juror was withdrawn, and the plaintiff had leave to amend. Upon which he filed a new declaration, and a new issue was made up, in substance the same as the first.

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*The letter upon which the action is founded was not addressed to the plaintiffs, but to John and *Joseph* Naylor and Company.

A person cannot take by a grant made to him by a wrong name. *Moor*, 197. *Panton* v. *Chose.* 1 *Salk.* 7. *Cro. Eliz.* 897. *ca.* 22. *Field* v. *Wilson.* *Willes*, 554. 556. *Evans* v. *King.*

No parol evidence is admissible to vary a written agreement. 3 *Dall.* 416. *Clarke* v. *Russel.* 1 *H. Bl.* 289. *Gunnis* v. *Erhart.*

This was a promise to pay the debt of another, and within the statute of frauds. *Cowp.* 227. *Jones* v. *Cooper.* 2 *T. R.* 80. *Matson* v. *Wharam.* 1 *Salk.* 23.

The written agreement must show the *consideration* as well as the *promise.* The *whole* agreement must be in writing. *5 East*, 10. *Wain* v. *Warlters.* No parol testimony can supply the defect.

The declaration must set forth the special agreement *precisely.* The *probata* must agree with the *allegata.* 2 *Bos. & Pull.* 281. *Wilson* v. *Gilbert.* 3 *Bos. & Pull.* 559. *Whitwell* v. *Bennett.* 6 *T. R.* 363. *Spalding* v. *Mure.* 5 *East*, 111. *note. Bordenave* v. *Bartlett.* 3 *Esp. Rep.* 205. 3 *Bos. & Pull.* 456. *Turner* v. *Eyles.*

The plaintiffs cannot, upon this evidence, recover either upon the special counts or the money counts. 4 *Bos. & Pull.* 351. *Cooke* v. *Munstone.*

The letter is not an *absolute* guaranty, but *upon condition* that John and Joseph Naylor should think it necessary. There is no evidence of notice to the defendant that the plaintiffs thought it necessary. They ought to have given the defendant notice that they held him responsible, in order that he might take means to secure himself.

It was not a continuing guaranty. It is to be considered as extending only to the first importation of goods; *but the plaintiffs have recovered upon the transactions of several years. *230

The declaration ought to have set out specially what engagement Hackett & Grant had made and failed to comply with.

Ingersoll, contra.

There are only three questions made in this case.

1. Whether the letter of credit rendered the defendant liable to the extent of the plaintiffs' demand.

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2. Whether the objection, arising from the mistake in addressing the plaintiffs as John and *Joseph*, instead of John and *Jeremiah*, is not obviated by the proof, without an averment in the declaration that the same persons were meant.

3. Whether the evidence under the commission was admissible.

1. On the first point he contended that it was apparent on the face of the letter, and from the nature of the business in which Hackett & Grant were about to engage, that a continuing guaranty was intended. And that if there was any ambiguity in the expressions of the letter upon that point, they ought to be taken most strongly against the writer, and that a letter of credit was a contract which required to be executed among merchants with peculiar good faith.

2. Parol evidence was admissible to show that John and *Joseph* meant John and *Jeremiah*. 10 *Co.* 124, 125. b.

It is admitted that if the obligor be sued by the name in the bond, and it be proved by parol that the defendant delivered the bond, he is estopped to deny his name to be as in the bond. So in *assumpsit*, parol evidence may be given to show that the contract was made with *A.* by the name of *B.*, and to show that the writing was delivered to *A.*

* 231 *It is the custom in Europe among merchants to keep the name of a firm long after the original copartners are dead. Suppose a letter of credit addressed to the old firm be delivered to persons not named in the letter, and they furnish the goods, shall they not be entitled to recover upon this letter of credit?

In the present case, suppose there is no such person as Joseph, then his name is a surplusage, and it is a letter to John. And then what is the objection to a suit in the name of John and Jeremiah?

It may state the contract according to its legal import. If a bond be made in the name of John, and James deliver it, it is the bond of James. So may a letter addressed to John and Joseph, delivered to John and Jeremiah, constitute a contract with John and Jeremiah. It was competent to prove that Alexander Grant delivered the letter to John and Jeremiah, and that there was no other firm in Wakefield of the name of *Naylor*.

It was not necessary to state in the declaration that the contract was in writing, nor that John and Joseph meant John and Jeremiah. If John and Jeremiah had drawn a bill of exchange in the name of John and Joseph, John and Jeremiah would have been liable. So on a policy of insurance in the name of *A.*, but for the use of *B.*, it is not necessary to aver it to be so, but an action may be brought directly in the name of *B.*

So if I direct my correspondent, having funds in his hand, to make insurance, and he fails to do so, I may charge him as insurer, without stating specially the circumstances which render him liable. So in a case of *executor de son tort*, I charge him as executor generally, without stating the facts of intermeddling with the goods, &c. whereby he is liable to be sued as executor.

Ingersoll inquired of the court whether it was required that he should say any thing upon the execution of the commission and the depositions.

MARSHALL, Ch. J. The only doubt entertained by the court upon that point is as to the change of the issue.

**Ingersoll.* The case cited from *Eq. Ca. Abr.* furnishes the answer. In that case there was *no* issue when the depositions were taken, but here was an issue the same in substance as that upon which the cause was tried. * 232

On the next day, *Harper*, on the same side, was stopped by

The Court, as to the point of the change of the issue, saying that the issue was in substance the same, and that the court was satisfied that the judgment was not erroneous on that account.

Harper. The cases in which parol evidence is admitted to explain a written agreement, are,

1st. Of ambiguity; and,

2d. Of mistake.

1. Of *ambiguity*, where it is *patent*, it is the province of the court to explain it from the instrument itself, and the judges cannot resort to evidence *dehors*.

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When there is no ambiguity upon the face of the instrument, but an uncertainty arises from facts out of the instrument, (as where there are two persons of the same name and description,) there the ambiguity may be explained by parol testimony.

You may not by parol evidence vary, extend or curtail a written instrument, but you may explain it. 2 *Vez.* 216. *Hampshire* v. *Pierce.* *Powell on Contracts*, 431.

The case of *Clarke and Russel* was a case of patent ambiguity.

2. But we say this is not a case of latent or patent ambiguity, but of *mistake*, and there are many instances where a mistake may be corrected by parol. 3 *T. R.* *The King* v. *The Inhabitants of Scammonden.* 6 *T. R.* 671. *Thomas* v. *Thomas.* *Powell on Contracts*, 432. *Cro. Car.* 501. *Nevison* v. *Whitney.* 2 *P. Wms.* 141.

* 233 *CHASE, J. There was a case of Lord Baltimore's devise to his son *Benjamin*, when his name was *Benedict.* Benedict recovered in an ejectment, having proved himself to be the person meant.

Harper. The case from 10 *Co.* 124. is no authority. It is the opinion of one judge only, and the other appears to have been the better lawyer. And even in that case parol evidence must have been admitted to show that there was not another corporation of that name.

There is a difference between proving that something was *agreed* which does not appear in the writing, and proving that it was agreed that something should be inserted in the written agreement which was omitted by mistake. 3 *Wilson*, 275. *Meres* v. *Ansel.* This was a mistake of Travis, the agent. It was agreed that the guaranty should be by Grant to John and *Jeremiah*, but by mistake it was directed John and *Joseph.*

3. No averment was necessary in the declaration that John and Jeremiah were the persons meant, because it was not necessary to set forth the written agreement in the declaration.

4. There can be no doubt that the guaranty was general. By the very terms of the letter the defendant

undertook to guaranty any engagements which Hackett & Grant should enter into for *any* transaction they might have with the plaintiffs.

5. No notice was necessary to inform the defendant that a guaranty was necessary. The contract did not require notice.

Martin, in reply.

Although the name of a firm sometimes continues after some of the original partners are dead, yet when they sue they must declare that A., B. and C., trading under the name and firm of D., E. and F., &c.

So in this case, if the fact would justify them, the plaintiffs might have declared that the defendant promised *the plaintiffs, trading under the name and firm of *John and Joseph Naylor & Co.* *234

The plaintiffs are bound to name all the persons entitled to be joined as plaintiffs, at their peril.

The action cannot be supported by any acts done by the plaintiffs. There can be no *assumpsit* in law. The whole contract arises from the letter. Its legal import must appear upon the face of it.

We offer no parol evidence to create an ambiguity, and there is none on the face of the instrument. The variance is apparent upon comparing the evidence with the declaration.

It is true that *equity* will interpose in some cases of mistake, where it was agreed that something should be inserted in the writing, which was not done, and the writing was drawn by the other party; or where there is any thing omitted through fraud, one party being illiterate, &c. But here the plaintiffs were not bound to part with their goods upon such a letter; it was their own folly to do it. They made no mistake.

March 29.

MARSHALL, Ch. J. delivered the opinion of the court, as follows:

In this case three points are made by the plaintiff in error on the letter which constitutes the basis of this action. He contends,

1st. That this letter being a collateral undertaking, and being addressed to John and *Joseph* Naylor & Co. the plaintiffs below cannot be admitted to prove by pa-

rol testimony that it was intended for, and is, an *assumpsit* to John and *Jeremiah* Naylor.

2d. That the undertaking was conditional, and required notice to be given to the writer of the intent and nature of his liability.

* 235 *3d. That it is confined to the shipments made during the year in which it was written.

On the first objection the court has felt considerable difficulty. That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that a promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation cases within the principles.

Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion.

On examining the cases which have been cited at the bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case.

This is not a case of ambiguity.

It is not an ambiguity patent, for the face of the letter can excite no doubt.

It is not a latent ambiguity, for there are not two firms of the name of John and Joseph Naylor & Co. to either of which this letter might have been delivered.

It is not a case of fraud. And if it was, a court of chancery would probably be the tribunal which would, if any could, afford redress.

If it be a case of mistake, it is a mistake of the writer only, not of him by whom the goods were advanced, and who claims the benefit of the promise.

* 236 *Without reviewing all the cases which have been urged from the bar, it may be said with confidence that no one of them is a precedent for this.

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A letter addressed by mistake, it is admitted, to one house, is delivered to another. It contains no application or promise to the company to which it is delivered, but contains an application and a promise to a different company not existing at that place. The company to which it is delivered are not imposed upon with respect to the address, but knowing that the letter was not directed to them, they trust the bearer, who came to make contracts, on his own account. In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make it such a contract, is going further than courts have ever gone, where the writing is itself the contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it.

It being the opinion of a majority of the court that John and Jeremiah Naylor could not maintain their action on this letter, it becomes unnecessary to consider the other points which were made at the bar. It is the opinion of this court that the circuit court erred in directing the jury that the evidence given by the plaintiffs in that court was proper and sufficient to support the issue on their part. The judgment of the circuit court is, therefore, to be reversed, and the cause sent back for further trial.

Judgment reversed.

*WOODS AND BEMIS *v.* YOUNG. * 237

The refusal of the court below to continue a cause after it is at issue, cannot be assigned for error.

ERROR to the circuit court of the district of Columbia, sitting at Alexandria.

The plaintiffs below, Woods & Bemis, took a bill of exceptions to the refusal of the court to continue the cause till next term, upon their motion grounded on an affidavit stating the absence of a witness, the facts which they expected to prove by him, on a belief that he would prove those facts, (which appeared to be material to the issue,) that he resided in the *state of Maryland, about* 25

Woods v. Young.

miles from the place of trial, had been summoned, and promised to attend; that the cause had been called at a former day for trial in the regular course of the docket, and was then postponed at the request of the plaintiffs, on account of the absence of that witness; that the cause being now again called for trial, the witness was still absent, but it was expected that his attendance might be had at the next term.

The bill of exceptions stated a general rule of practice which had been made at a former term, and entered on the minutes of the court, and which was still in force, "that when a motion shall be made for the continuance of a cause for want of a witness, the affidavit must state the fact or facts which the party making the affidavit expects to prove by such witness, and that the said party verily believes that the said witness will prove such fact or facts, and that he the deponent *has used all proper means to obtain the attendance of such witness*, and that he believes he shall be able to procure the testimony of such witness at the next term, or in a reasonable time to be therein stated."

No motion had been made for an attachment against the witness, or any other process to compel his attendance.

*238 *The case was submitted to the court without argument, by *Swann*, for the plaintiffs, and *Youngs*, for the defendant.

By the Court.

The question is, whether a refusal to continue a cause can be assigned for error.

The impression of the court is, that it cannot. Has the party, *by law*, a right to a continuance in any case? If he has it will have weight. Is it not merely a matter of favour and discretion?

This is a case in which this court cannot look into the merits of the question, whether the court below ought to have granted a continuance of the cause.

Judgment affirmed, with costs.(*a*)

(*a*) This case was brought up in expectation that this court would have decided the question whether an attachment can be served upon a person who resides out of the district, but within 100 miles of the place of trial,

*YOUNG *v.* PRESTON.

If A. agree, under seal, to do certain work for B. and does part, but is prevented by B. from finishing it according to contract; A. cannot maintain a *quantum meruit* against B. for the work actually performed, but must sue upon the sealed instrument.

ERROR to the circuit court for the district of Columbia in an action of *assumpsit*, brought by *Preston* against *Young*, upon a *quantum meruit* for work and labour.

At the trial below, the defendant, Young, offered in evidence a *sealed* agreement between the parties, and offered further evidence that the work and labour for which this action was brought, were done in consequence of that agreement; and prayed the court to instruct the jury that if, from the evidence, they should be of opinion that the said work and labour was done in consequence of the sealed agreement, the action of *assumpsit* would not lie: which instruction the court refused to give, evidence having been offered to the jury that the plaintiff was prevented from completing the work mentioned in the agreement by the defendant, who employed another person to finish it.

But the court instructed the jury that if, from the evidence, they should be of opinion that the plaintiff was prevented by the defendant from proceeding to complete the said work, according to the said agreement, in a reasonable time, then the plaintiff had a right to recover, in this form of action, from the defendant, as much money as the plaintiff deserved to have for the work done by him for the defendant, although the same was done in consequence of the said agreement, and although the whole work mentioned in the said agreement was not completed. To which refusal and instruction the defendant excepted; and the judgment below being against him, he brought his writ of error.

Upon the opening of the case, *this court, without argument, reversed the judgment.*

*On a subsequent day, *C. Simms*, one of the counsel for the defendant in error, not having been present at the * 240

and who has been summoned and fails to attend as a witness in a civil cause.

But the court having intimated an opinion that the refusal to continue the cause could not be assigned for error, the counsel did not argue the other point.

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opening of the case, was permitted by the court to cite authorities in support of the opinion of the court below, and cited the following: *Towers* v. *Barrett*, 1 *T. R.* 133. where it was decided that *assumpsit* for money had and received will lie to recover money paid on a contract which is put an end to, as where, either by the terms of the contract it is left in the plaintiff's power to rescind it by any act, and he does it; or where the *defendant assents to its being rescinded.* In that case, the counsel for the defendant admitted, that when the party has *done any thing to preclude himself from going into the contract*, then money had and received will lie. *Buller*, J. said, "The defendant left it in the power of the plaintiff *to put an end to the contract.* If the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of that contract."

So in *Giles* v. *Edwards*, 7 *T. R.* 181. there was a special contract between the plaintiff and the defendant, which the defendant had prevented the plaintiff from completing. The court was clearly of opinion, that "as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and recover back the money they had paid under it." So here, Simms contended, that as the defendant had prevented the plaintiff from completing the contract, the plaintiff had a right to put an end to it. If he had paid money under the contract, he would have had a right to recover it back; but as instead of advancing money, he had done work and labour, which could not be recovered back *in specie*, he had a right to recover its value.

So in 1 *Powell on Contracts*, 417. "If he, who is benefited by another's fulfilling his contract or agreement, is the occasion why it is not carried into execution, the contract or agreement *is thereby entirely dissolved*, and the party bound discharged from his obligation."

But notwithstanding these authorities, *the court* adhered to their first impression, some of the judges saying, *that the plaintiff had a clear right of action upon the sealed instrument; he might aver in his declaration that he had, in part, performed the work, and was ready to do the rest, but was prevented by the defendant. And whenever a man *may* have an action on a sealed instrument, he is bound to resort to it.

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Judgment reversed.

ROSE *v.* HIMELY.

THIS was an appeal from the sentence of the *circuit court* for the district of South Carolina, which reversed that of the *district judge*, who awarded restitution, to Rose, the libellant, of certain goods, part of the cargo of the American *schooner Sarah*.

This vessel, after trading with the brigands, or rebels of St. Domingo, at several of their ports, sailed from thence, with a cargo purchased there, for the United States; and had proceeded more than ten leagues from the coast of St. Domingo, when she was arrested by a *French* privateer, on the 23d of February, 1804, carried into the *Spanish* port of *Barracoa*, in the island of Cuba; and there, with her cargo, sold by the captors, on the 18th of March, 1804, before condemnation, but under authority, as it was said, of a person who styled himself agent of the government of *St. Domingo*, at *St. Jago de Cuba*. The greater part of the cargo was purchased by ——— Cott, the master of an American vessel called the *Example*, into which vessel the goods were *clandestinely* transferred from the *Sarah*, in the night time, and brought into the port of Charleston, in South Carolina, where they were followed by Rose, the supercargo of the Sarah, who filed a libel against them, in behalf of the former owners, complaining of the unlawful seizure on the high seas, and praying for restoration of the goods: whereupon process was issued, and *the goods were arrested by the marshal, on the *4th of May*, 1804. No steps appear to have been taken by the French captors, towards obtaining a condemnation of the vessel, until time enough had elapsed for them to receive information of the proceedings against the goods in this country. The forms of adju-

If a claim be set up under the sentence of condemnation of a foreign court, *this* court will examine into the jurisdiction of such court; and if that court cannot, *consistently with the law of nations*, exercise the jurisdiction which it has assumed, its sentence is to be disregarded; but of their own jurisdiction, so far as it depends upon *municipal laws*, the courts of every country are the exclusive judges. Every sentence of condemnation by a competent court, having jurisdiction over the subject matter of its judgment, is conclusive as to the title to the thing claimed under it.

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The prohibition, by France, of all trade with the revolted blacks of Santo Domingo, was an exercise of a *municipal, not* of a *belligerent* right; and seizures under that prohibition were only authorized within two leagues of the coasts of that island.

A seizure beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is not warranted by the law of nations; and such a seizure cannot give jurisdiction to the courts of the offended country; especially if the property seized be never carried within its territorial jurisdiction.

Quere, whether a French court can, consistently with the law of nations, and the treaty, condemn American property never carried into the dominions of France, and while lying in a port of the United States.

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dication were begun in the tribunal of the first instance, at *Santo Domingo*, in July, 1804, and the condemnation was had before the middle of that month.

This condemnation purports to be made conformably to the first article of the *arrete* of the captain-general, (*Ferrand*,) of the 1*st of March*, 1804, which was issued six days subsequent to the seizure of the vessel.

This article was as follows: "The port of Santo Domingo is the only one of the colony of Santo Domingo, open to French and foreign commerce; consequently, every vessel anchored in the bays, coves and landing places of the coast occupied by the revolters, those destined for the ports in their possession, and coming out with or without cargoes; and, generally, every vessel sailing within the territorial extent of the island, (except between Cape Raphael, and the bay of Ocoa,) found at a less distance than two leagues from the coast, shall be arrested by the vessels of the state, and by privateers bearing our letters of *marque*, who shall conduct them, as much as possible, into the port of Santo Domingo, that the confiscation of the said vessels and cargoes may be pronounced."

On the 6th of September, 1806, no sentence of condemnation having been produced in evidence, the judge of the district court decreed restitution of the property to the libellant, from which sentence the other party appealed to the circuit court, and there produced the sentence of condemnation, by the *tribunal of the first instance*, at *Santo Domingo*. The circuit court reversed the sentence of the district court, and dismissed the libel.(*a*) *From this sentence, the libellant appealed to this court.

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For the libellant, the case was argued by *C. Lee*, *Harper*, *S. Chase*, jun. *Dallas*, *Rawle*, *Ingersoll*, and *Drayton*; and,

For the respondent, by *Duponceau*, *E. Tilghman*, and *Martin*.(*b*)

(*a*) The reasons of the circuit court are stated by Judge Johnson, in this sentence, see Appendix, note (C).

(*b*) This case was argued in connection with the case of *Rose* v. *Groening*, which was a libel for another part of the cargo of the *Sarah*, and with the case of *La Font* v. *Bigelow*, from Maryland, which was an *action of replevin* by the original owner of goods condemned by the tribunal

For the libellant, it was contended,

1. That this was not a seizure *as prize of war*, but *as a forfeiture for violation of the municipal law of France;* and,

2. That whether it were seized *jure belli*, or *jure civili*, it was not competent for the court, sitting at *Santo Domingo*, to condemn the property, while it was in a *neutral* foreign port. *244

1st point.

This is not a case of prize of war, but of municipal forfeiture.

The tribunal of the first instance was a municipal court; and it is doubtful whether it had cognisance of questions of *prize of war*. But if it had a general prize jurisdiction, it could not, consistently with our treaty with France, (*Laws U. S.* vol. 6. p. 34. art. 22.) condemn a prize not carried into a French port. The words of the article are, "it is further agreed that, in all cases, the established courts for prize causes, *in the country to which the prizes may be conducted*, shall *alone* take cognisance of them." Hence it is to be inferred, that as they could not consistently with the treaty, take cognisance of the case as *prize of war*, they themselves must have considered it as a mere seizure, for violation of a municipal regulation. It is characteristic of *prize of war*, that it is done with a

at Santo Domingo, under similar circumstances; and with the case of *Hudson & Smith* v. *Guestier*, also from Maryland, which was *trover* for the cargo of the *Sea Flower*, condemned upon similar grounds; and with the case of *Palmer & Higgins* v. *Dutilgh*, from Pennsylvania, which was *replevin* for the cargo of the *brig Ceres*, condemned under similar circumstances; and with the case of *Pluyment* v. *The Brig Ceres*, which was a *libel* in the district court of the United States at Philadelphia, for restoration of the vessel. These cases were all supposed to depend on the same questions, and by consent of counsel, with leave of the court, were argued as one cause. This accounts for the great number of the counsel employed, and for the great length of the argument, which consumed *nine days*.

Upon the opening of these cases, six judges being present, it appeared that three of the six judges had given opinions in the circuit court upon the principal points which were about to be argued, and that if each judge who had given an opinion, should withdraw from the bench, as had been customary heretofore, there would not remain a *quorum* to try the cause. It was thereupon agreed, by all the judges, that they would sit. *Chase, Johnson, and Livingston, Justices*, expressed themselves strongly against the practice of a judge's leaving the bench because he had decided the case in the court below. *Washington, Justice*, said he should not insist upon the practice, if it should be generally abandoned by the judges. The whole six judges (*Todd, Justice*, being absent) sat in the cause; so that the practice of *retiring* seems to be abandoned.

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view to annoy *an enemy*. When a neutral violates his neutrality, he becomes, *quoad hoc*, an ally to the enemy, and the ground of condemnation is always as enemy property. But here was no feature of public war. It was merely an insurrection. All the world considered the blacks of St. Domingo as revolted subjects. Our government has acknowledged the right of France to legislate over those colonies. The French arrete is not a measure of *war*, but of *government;* and is a mere municipal regulation to enforce obedience to her laws, and for the reduction of the insurgents. The law of France rendered the trade illicit, but a seizure for illicit trade is not the exercise of a right of war. It had no relation to a state of war; and might have been passed, if the most profound peace had existed throughout the world.

In the year 1802, France, Spain, and England were at peace with each other, and with all the world. The proceedings of France against her revolted colonies were of a *civil* nature; at least they were so considered by her. (*See Bonaparte's letter to Toussaint, and Le *Clerc's letter of November*, 1802, *and his address to the people of St. Domingo.*) Toussaint also considered himself as holding under the government of France, and to show his confidence, left his children in France as hostages.

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The tribunals in *Santo Domingo* were the ordinary tribunals of municipal jurisdiction, and not exclusively courts of prize. Their jurisdiction depended upon the *arretes* of the consuls of France, of the *18th of June, and 2d of October*, 1802,(*a*) (a time of profound peace,)

(*a*) The following is the arrete of 18th of June, 1802.

"Arrete of the consuls concerning the mode of administration of civil and criminal justice in the colonies restored to France by the treaty of Amiens.

"The consuls, &c. on the report, &c. decree:

"1. In the colonies restored to France by the treaty of Amiens of 6th Germinal last, (27th March, 1802,) the tribunals which existed in 1789, shall continue to administer justice in civil as well as criminal matters, according to the forms of proceedings, laws, regulations, and tables of fees then observed, and so that nothing be innovated as to the organization, jurisdiction and competence of the said tribunals.

"2. The denominations of seneschalsea, admiralty, and royal jurisdiction courts, shall be supplied by that of *tribunal of the first instance;* but from this change of denomination no change is to be inferred as to the jurisdiction of the ancient tribunals, and particularly of the courts of admiralty.

"3. The public ministry shall be exercised by commissaries of the government and their substitutes.

*and which refer to the year 1789, a time when France was also at peace with all the world. There was, then, no necessity of a prize court; and neither of those *arretes allude particularly to the insurrection of the blacks. That of 2d October, 1802, relates generally to the smuggling trade of the colonies, and refers to the *ancient laws*, not to the laws of war; but the *municipal* laws. From the jurisdiction of the court, then, it cannot be inferred that this was a case of prize of war; nor will such an inference be drawn from the colonial regulations respecting the trade.

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The first of these is the *arrete* of the captain-general, dated the 22d of June, 1802,(*a*) which is entirely muni-

"4. There shall be provided a special regulation for the changes to be made in the present tribunals at *Tobago*.

"5. Judgments shall run in the name of the French Republic.

"6. The members of the tribunals shall be provisionally nominated according to the requisite forms, by the captain-general. He shall receive from each of them a promise of fidelity to the French republic."

The following is the arrete of 2d October, 1802.

"Arrete for regulating the forms to be observed for the proceedings and judgment of *contraventions* to the laws concerning foreign commerce in the colonies.

"The consuls, &c. on the report, &c. decree:

"1. The contraventions to the dispositions of the laws and regulations concerning foreign commerce in the colonies shall be proceeded on and adjudicated in the form hereinafter mentioned.

"2. The *instruction*" (*proceedings in preparatorio*) "and *first judgment* shall belong to the *ordinary tribunal of the place where the prize shall have been conducted*, subject to an appeal in all cases to special commissioners, who shall pronounce in the last resort.

"The said *instruction* shall be made summarily and on simple memoirs.

"3. Within the extent of each captain-generalship, the commission shall be composed of the captain-general, the colonial prefect, the commissary of justice, or the grand judge; and in case of impediment of any of them, then of a substitute, (*celui qui le remplace*,) and besides, of three members of the court of appeal, chosen for each cause by the captain-general.

[Here follows a particular regulation as to *Tobago*.]

"4. In case of a division of opinions, that of the president shall preponderate.

"5. The inspector of the marine, or the officer of administration doing the duty of inspector, shall, of right, exercise the functions of the public ministry in the said commission of appeal.

"The functions of clerk shall be exercised by a secretary appointed for that purpose by the captain-general.

"6. As to the residue, the ancient laws shall be executed, so far as they are not altered by the present regulation.

"7. The minister of the marine and the colonies is charged with the execution of the present arrete, which shall be inserted in the bulletin of the laws.

(Signed) "BONAPARTE."

(*a*) The 13th article of that *arrete*, which is the only article referred to in the sentence of condemnation, is as follows:

"Every vessel, French or foreign, which shall be found by the vessels of the republic anchored in any of the ports of the island not designated by

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cipal, and applies as well to French as to foreign vessels, and is limited in its operation to within two leagues of the coast.

The next is that of the 9th of October, 1802, which is to the same effect.

The last is that of 1st March, 1804, which as to these cases was clearly *ex post facto*, but if applicable at all, shows itself to be merely an exercise of a municipal right. The sentence of condemnation itself does not pretend to consider the vessel as prize of war, but as a seizure made for the violation of those municipal regulations of trade which it recites. The order that the proceeds should be distributed according to the laws respecting prizes, would have been unnecessary, if it had been a case of prize, to which those laws would have applied independent of the order.

There would have been a gross inconsistency in France treating the revolters as rebels, and yet claiming that other nations should consider them as acknowledged enemies. Yet before France can claim the rights of war from neutrals, in regard to the insurgents of St. Domingo, she must *admit them to be *enemies*, and not *rebels*. If they are independent, and France is at *war* with them, France can claim from us only the rights which war gives. We shall have a clear right to trade with them, unless in contraband of war, or to blockaded ports.

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It either is, or is not, prize of war. There are only two sides to the question. *Prize* is a seizure *jure belli*. There must be a *war* to raise a question of prize. No open war then existed with any nation. It is said that by aiding rebels we make a common cause with them; but the assistance, to justify such an inference, must be the act of the nation, not the unauthorized act of individuals. Until the year 1806, the United States had never declared the trade to be unlawful; nor did France require our government to take notice of the trade, until the fall of 1805. The law of nations does not authorize the seizure and confiscation of the property of foreigners trading with rebels. No authority to that effect has been cited from any writer upon that law. A state has, by the

these presents, or within the bays, coves, or landings of the coast, or under sail at a distance less than two leagues from the shore and communicating with the land, shall be arrested and confiscated."

law of nations, a right to regulate its own trade. A parent state may choose to exercise greater or less degree of severity, with regard to the trade of its colonies. England did not, until 1776, wholly prohibit trade with her North American colonies. The statute of 16 *Geo.* III. c. 5. prohibiting such trade, would have been altogether useless, if such trade had been unlawful in consequence of the rebellion. It declares "that all manner of trade and commerce is and shall be prohibited with the colonies of New Hampshire," &c. (naming the colonies,) "and that all ships and vessels of, or belonging to the *inhabitants* of the said colonies, together with their cargoes," &c. "and all other ships and vessels *whatsoever*, with their cargoes," &c. "which shall be found *trading* in any port or place, of the said colonies, or *going to trade*, or *coming from trading*, in any such port or place, shall become forfeited to his majesty, *as if* the same were the ships and effects of *open enemies*, and shall be so adjudged, deemed and taken, in all the courts of admiralty, and in all other courts whatsoever."

The French arretes limit the right of seizure to the extent of their territorial jurisdiction; but if they had *claimed a right under the law of nations, they would have authorized seizures as well on the high seas as within two leagues of the coast. *249

The title of the arrete of *General Ferrand*, of the 10*th Ventose*, *year* 12, (1*st March*, 1804,) which is referred to in the sentence of condemnation is, "an arrete relative to vessels taken *in contravention to the dispositions* of the laws and regulations concerning the *French and foreign* commerce, *with the colonies*," and the reason of passing the arrete, is stated in the preamble to be, "that some of the French agents in the allied and neighbouring islands, had mistaken the application of the laws and regulations concerning vessels taken *in contravention*, upon the coasts of Santo Domingo, occupied by the *rebels*, and had confounded *these* prizes with *those made upon the enemies of the state*; wishing to put an end to the abuses which may result therefrom, and which are as derogatory to the *territorial sovereignty*, as they are to *neutral rights*," &c. &c. thus clearly taking a distinction in terms between these municipal seizures, and prizes of w The 8th article also speaks of *acquitting the accuse*

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the contravention, and the sentence of the appellate court, speaking of its jurisdiction, describes it thus: "For pronouncing in the last resort upon appeals, from judgments rendered in the first instance, by the provisional commission of justice, sitting in the town of *Santo Domingo*, upon prizes made by the vessels of the state, and by French privateers upon *neutrals*, taken in contravention of the laws and regulations, concerning the *smuggling* trade of the colony," (a l'occasion des prises faites par les batiments de l'etat, et par les corsaires François, sur les neutres pris en contravention aux lois et reglemens concernant *le commerce interope* de la colonie.)

If this trade was illegal by the law of nations, there was no necessity for these French laws upon the subject.

2d point.

Whether the seizure were made as prize of war, or for violating a municipal law of trade, it was not competent *for the court sitting at *Santo Domingo*, to condemn the property *while lying in a foreign neutral port.*

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No title could vest in the purchaser by a sale, without a condemnation; although, perhaps, a subsequent legal condemnation might relate back to the time of the sale, and vest a legal title in the purchaser. But the condemnation of the property in this case could not be a legal condemnation, while the property was not only in *South Carolina*, but actually in the custody of *our* law. It had got back to the country of its original owner, who had claimed the protection of our laws.

The mere capture, even by a belligerent and *jure belli*, does not devest the title of the property out of the neutral owner; but an order or sentence of some competent tribunal is necessary for that purpose.

The title of the captor, before condemnation, does not extend beyond his actual possession; and if he loses or quits the possession, his title is entirely gone. Here had been a change of possession before condemnation. If a captured vessel escape before condemnation, the title revests in the former owner. 4 *Rob.* 50. *The Henrick and Maria. Collection of Sea Laws*, 629. 8 *T. R. Havilock* v. *Rockwood.* 1 *Rob.* 114. *The Flad Oyen.* 2 *Burr.* 693. *Goss* v. *Withers.* *Institute* 2. 1. 17.

Although new evidence may be admitted upon the appeal, yet the sentence of condemnation in this case ought not to have been admitted, because it was not the sentence of a competent tribunal. The question of compe-

tence is always open, whatever may be the law as to the conclusiveness of a foreign sentence. The court at *Santo Domingo* had no jurisdiction over this coffee.

Incompetence may arise from want of jurisdiction, as to the subject of litigation, or as to the place where the tribunal sits. Neither by the law of nations, nor by treaty, could it condemn property while it was in the custody of our laws, and in contest in our courts. Even if the property had been in *France*, it is very doubtful whether the court of *Santo Domingo* could have condemned it. The proceeding was *in rem*, and from the nature of things, the *res*, the *thing* against which the *suit is instituted, ought to be within the power and jurisdiction of the court before which it is tried; it ought at least to be in the same country. If it be a case of *mere municipal* jurisdiction, the court cannot proceed if the *thing* be in the country even of an *ally*; for an *ally* in a war is not an *ally* as to the execution of the municipal laws of the *co-ally*. Suppose a seizure to be made by *Spain*, for an illicit trade in contravention of her municipal laws, and the vessel never carried into a *Spanish* port, but into a *French* port. The *Spanish* court could not proceed. One country will not enforce the municipal laws of another. In this country no court has jurisdiction *in rem*, unless the *thing* be within its jurisdiction. So by our treaty with *France*, no court has jurisdiction of a cause of prize but the court of the place or country to which the prize was carried. But here the vessel was carried to a *Spanish* country, and condemned in a *French court*.

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This court has an undoubted right to examine into the competency of the court whose sentence is produced in evidence. That question was decided in the case of *Glass* v. *Gibbs*, (*The Betsey*,) 3 *Dall.* 7. and if not competent, this court will disregard its sentence.

Sir W. Scott, in a great number of cases, has looked into the question of the competency and jurisdiction of the court, and inquired whether the court proceeded according to the law of nations. 1 *Rob.* 142. *The Flad Oyen.* 8 *T. R.* 270. *Havilock* v. *Rockwood*, and 2 *Rob.* 172. *The Christopher.*

In the case of *Sheafe & Turner* v. *A parcel of sugars*,

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in the circuit court of South Carolina, in 1800, the sugars, it is said, were carried into a Spanish port and condemned in a French port; but Spain was then an ally of France, and the capture was *jure belli.*

When it is said that a neutral court has no cognisance of prize, it means that a neutral court cannot interfere between *belligerents*, but not that a neutral court shall not interfere between a belligerent and one of its own neutral citizens. 3 *Rob.* 82. *The Kierlighett.* 2 *Rob.* 239. *The Perseverance.* Of what use is a treaty, * 252 if a sentence *contrary to that treaty is to be respected by the nation whose rights are thereby violated? In *Mayne* v. *Walter*, *Park*, 414. *Pollard* v. *Bell*, 8 *T. R.* 437. and *Bird* v. *Appleton*, 8 *T. R.* 562. it is decided that a condemnation grounded upon an arbitrary arrete is void. *Browne* (*Civ. Law*, vol. 2. p. 332.) says, that where the proceeding is *in rem*, it must be where the *thing* is. The powers of *condemnation* and of *restoration* belong to the same court. It must have the possession of the thing in order to restore it.

The court is said to proceed *instanter*, *velo levato.* If the court of Santo Domingo had decreed restitution, it could not have enforced its decree. In the case of the *Henrick and Maria*, 4 *Rob.* 52. Sir W. Scott, while he acknowledges that the English practice has been to condemn vessels lying in a *neutral* port, seems to express a wish that the superior court would *recal* the practice *to the proper purity of the principle.* In p. 46. he says, that "upon principle it is not to be asserted that a ship, brought into a *neutral* port, is, with effect, proceeded against in the *belligerent* country. The *res ipsa*, the *corpus*, is not within the possession of the court; and *possession, in such cases, founds jurisdiction.*"

It was upon this *pure* principle that the 22d article of the French convention was founded. It is no argument to say that the courts of each nation must have an equal right to expound that convention, and that if we think their construction incorrect, we must apply to government for redress. If application were to be made to government, we should be sent back again to our courts of law; and not until it should be there pronounced that the French construction was incorrect, would *our* government make application to that of France for redress. In case of rescue or escape, the government is

never bound to restore. The capturing nation takes redress in its own way, and by its own strength, and cannot require the aid of our arm. The penal laws of a foreign country can affect only the property in its power, (1 *H. Bl.* 134, 135.) and cannot be executed by the courts of another. 2 *Wash.* 295. 298. Municipal law cannot make prize of war. 2 *Dall.* 4. 3 *Dall.* 77. *And if the thing be not within the jurisdiction of the court, it cannot proceed. 3 *Dall.* 86. It must at least be in the country of the captor, or of his ally. 2 *Browne's Civ. Law*, 268. * 253

No property can be acquired by capture, unless it be carried *infra præsidia*, *i. e.* into the ports of the enemy of the captured; and according to *Lee*, the ports of an ally will not answer. *Lee on Captures*, 87—96. A capture cannot give a title, unless it be of enemy's property. 2 *Dall.* 2. 34. The case of *Wheelwright* v. *Depeyster*, 1 *Johns. Rep.* 471. was in all its circumstances exactly like the present, and the supreme court of New-York decided the court at Santo Domingo to be incompetent to condemn a vessel lying at *St. Jago de Cuba*. Spain was not an ally in the war. She professed to be neutral, and was bound to neutral duties. (See her own declaration to her subjects, dated the 10th of September, 1804, and her manifesto and declaration of war of 10th December, 1804, in the New Annual Register of that year.) Although there was a treaty of alliance between her and France, yet, by the terms of that treaty, Spain was not bound to assist France until called upon; and France had not then demanded her aid. She was, therefore, neutral, and was bound to refrain from giving any direct aid to either of the belligerents. But to allow one belligerent to carry prizes into her ports, and deposit them there for safe keeping, is a violation of neutrality; it is a direct aid. Spain did wrong to permit this kind of deposit, and therefore no right can be derived from it. It is not always necessary to make application to government for redress by negotiation or war. If the title derived from the captor be bad, and the thing is brought within the jurisdiction of our courts, it is competent for those courts to give redress, and restore the thing to its lawful owner. But when a neutral becomes an ally, she is no longer bound to perform these *neutral* duties; she becomes a

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partner in the war, and is bound to *belligerent* duties. She is bound to give her aid to her co-belligerent. The exception of the country of an ally, therefore, strengthens the general rule, that the property cannot be lawfully condemned while lying in a neutral country.

* 254 *The possession of one ally is *quoad hoc* the possession of the other.

Proceedings for forfeitures are always proceedings *in rem;* and to make them valid, it is always necessary that the court should have possession of the *thing*. Possession is the foundation of all its proceedings. How can it condemn what is not in its power to give? Or how restore what is not within its control? This principle applies as universally to captures *jure belli*, as to seizures for municipal offences. If this be a municipal seizure, it is immaterial whether Spain was an ally in the war or not; because she could not be an ally as to municipal offences. One ally never gives up offenders against the municipal laws of the other, unless bound so to do by treaty. One ally is not bound to aid the other in maintaining the authority of its own laws. So if property be carried to the country of one ally, the laws of the other cannot reach it. The former is not bound to give it up to the latter, nor to enforce its municipal judgments or decrees.

The arrete of 2d October, 1802, gives the jurisdiction only to "the ordinary tribunal of the *place where the prize shall have been conducted;*" so that by the *lex loci* the court at Santo Domingo had no jurisdiction, even if the vessel had laid at another French port.

Captors gain no right by mere capture. Whatever is acquired *jure belli* belongs to the sovereign. No title is gained until condemnation. 3 *Rob.* 193. France herself, when neutral, will not permit a belligerent to detain his prize in her ports more than 24 hours. 2 *Azuni*, 256. A man can sell only what he has. But the captor, before condemnation, had at most a right of possession. The right is said to be in abeyance, subject to the chance of recapture, and to the *jus postliminii*. If it be said that *jus postliminii* does not apply to neutrals, we say, that when a belligerent treats a neutral as an enemy, the latter becomes entitled to belligerent rights. If rescued, what becomes of the right acquired

by capture? There is no instance of a condemnation after such a rescue, nor of a complaint to *the government of the neutral. The rule in all cases of sale of captured goods is, *caveat emptor*.

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On the part of the respondent (*the purchaser under the sale at Barracoa*) it was admitted that there were only two questions in the case, viz.

1. Whether the vessel was seized *jure belli*, or in execution of the municipal laws?

2. Whether the condemnation by a court in Santo Domingo, while the vessel was in a Spanish port, was a legal condemnation?

1. The condemnation was in exercise of belligerent rights, and not for violation of a municipal law.

England, during the contest with these states, always claimed and exercised the rights of war. France never complained, even before she became a party. So France is to be considered as a belligerent with respect to *Hayti*. There were armies on both sides, arrayed against each other, fighting battles, taking towns, and carrying on a war in fact. It was not a trifling and partial insurrection, but a most cruel and bloody war. It was a *civil*, or rather a *servile* war, but not to be distinguished from other wars as to belligerent rights. The non-intercourse act, passed by congress in 1798 or 1799, if it had stood alone, might have been considered as a municipal regulation; but connected with other facts, it was taken by this court, to be an act of the partial war then waging against France. So the act of the British parliament, in 1776, prohibiting all trade with the North American colonies, was an act of war. The word *war* was not used, because England, as a matter of punctilio, would not acknowledge us as an independent nation. This court said we were at war with France in 1798, but congress did not say so; and France always denied it. So the Netherlands were at war with Spain for 70 years, but Spain would never acknowledge it.

If there was war between France and Hayti, the *arrete* seems clearly to be a war measure, an exercise of *belligerent rights. Its only object was the annoyance of the enemy. There are many acts which, if considered alone, might appear equivocal whether intended as measures of peace or of war, and can only

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be explained by concomitant circumstances. Municipal rights may be brought in aid of belligerent rights, and when hostilities are actually existing, an act which might be done in time of peace may be considered as a measure of war.(a)

(a) In answer to a question from the court, Mr. *Duponceau* observed as follows, viz.

The question is, whether France can, by the mere force of the law of nations, seize and confiscate vessels of neutral nations trading to Hayti.

If it is admitted that the situation of France with Hayti is a war, it follows, that France is at war, and we are neutrals.

If neutrals, we cannot judge of any thing as *de jure* which is the subject of the controversy between France and Hayti.

Hayti contends that *de jure* she is an independent state.

France contends that *de jure* Hayti is her dependent colony.

Of this, as neutrals, we are not permitted to judge.† We find them at war together, and at issue on this question of *dependent* or *independent;* we must take them both to be right.

We cannot, therefore, acknowledge the right of France to make and enforce *municipal* regulations for Hayti; it would be acknowledging the sovereignty of France over Hayti, and thus deciding the question between them, which we are not permitted to do as neutrals.

Nor can we permit our subjects to trade with Hayti, contrary to the prohibition of France, for that would be acknowledging the independence of Hayti, and as such would be a violation of our neutrality, by deciding in favour of one side the very question in controversy between them.

But it will be said, that if we consider France merely as a power at war with Hayti, she has no right to prohibit our trading with them, as one nation at war cannot forbid neutrals to trade with its enemy, except in contraband articles.

This is true in the case of a war between independent states, but this war is of a different character, and produces different effects.

It is a principle of the law of nations, that in war both belligerents and neutrals have a right, with respect to each other, to do all that they had a right to do in time of peace, and immediately before the war, but no more.‡

But in time of peace France prohibited other nations from trading with Hayti; that is, she prohibited them if she thought proper; in war she must continue to have the same right for the above reason, and because denying it to her would be judging the question in controversy between her and Hayti, which we have no right to do.

True, France claims it as a municipal right; it is the only object of her going to war; but she claims it of the Haytians, not of us, and if she did, we cannot concede it to her *as such;* we cannot grant her the right of binding the inhabitants of Hayti, or preventing *them* from trading with us; that we have nothing to do with; it is the

† 3 *Vat.* § 188. *Ibid.* § 190. 2 *Azuni,* 63. &c. *Hubner.*

‡ The prohibitions of England respecting the colonial trade of her enemies are founded on this principle, and carried to a degree of rigour which it does not seem to warrant.

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*It is not necessary that a prize court should be a court of admiralty. Prizes are sometimes condemned in a tribunal of commerce. 2 *Azuni*, 262. 3 *Bos. & Pull.* *526. But this was a court of admiralty. It was founded upon the model of the council of prizes at Paris. It is no part of the ordinary judicature; it is a political institution, established by a special commission from the government, to decide, in an *executive* capacity, on the validity of maritime captures. 2 *Azuni*, 268. 2 *New Code des Prises*, 1070. *Arrete of 18th June*, 1802. *258

2. The condemnation of the vessel was valid, although lying in a neutral country.

The correctness of such condemnations is questioned on the single dictum of Sir W. Scott. When in the *Flad Oyen*, 1 *Rob.* 119, 120. he said that there were only two cases of ships carried into foreign ports and con-

question *between them* which we are not to decide; but we must grant to her the right of binding us, and preventing us from trading with Hayti, not as a municipal right, which right our neutrality prevents us from acknowledging, but as a belligerent right, which she has to prevent us from interfering by our overt acts in the question of *dependence* or *independence* between her and the people of Hayti.

If she has the right to prevent us from interfering in that manner, she has incontestably by the law of nations the right of punishing that interference by the seizure and condemnation of our ships and goods found in contravention.

France then claims two sorts of rights, municipal and belligerent; but the former claim is only between her and Hayti, and that we have nothing to do with; the latter is between her and all the world, and those we are bound to notice.

From her claim of those two concurrent rights, she, as Britain did in our revolutionary war, clothes her prohibitions in the shape of municipal regulations, thereby pretending to assert her claim of jurisdiction over her revolted subjects; that form she adopts for the sake of her national dignity; but we, who are not bound to support that dignity, recognise her rights only so far as they are sanctioned by the laws of a war of the nature of that in which she is engaged, and no further; and they do not bind us further than the laws of war, applied to the particular war existing, expressly authorize, but they bind us so far.

It may be said that as France claims the right of sovereignty over Hayti, she cannot complain of us if we should allow her that right, though we are not bound to do it as neutrals. It is answered, that she indeed claims that right, but she claims it of the subjects of Hayti, and not of us; those which she claims of us are those of a belligerent; she knows that she cannot claim any other of a neutral state, which has nothing to do with her quarrel; and she would have a right to complain of our adding insult to injury, if we were to allow her a right which she does not claim of us, by way of reason or pretext for denying her one which she actually, and we think justly, claims.

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demned in England, he was not candid; he knew there were more than two such cases. And in 4 *Rob.* 52. *The Henrick and Maria*, he admits that the practice is *too inveterate* to be altered, and shows that the practice has been adopted or sanctioned by fourteen out of eighteen states in Europe. England adopted it as long ago as 1695. (4 *Rob.* 40.) In 1 *Wilson*, 191. as early as 1745, it was mentioned without exciting any astonishment; and in 4 *Rob.* 50. Sir *W. Scott* himself admits it was the practice in the wars of 1739, 1745, 1756, 1776 and 1793. France began it in 1705, and has continued it to this day. Sir W. Scott was mistaken in saying that the editor of the *New Code des Prises* speaks of it as an innovation. 1 *New Code des Prises*, 357. Russia adopted it in 1787, or perhaps earlier, and Spain during the last war, and probably before. It appears by 4 *Rob.* *259 *50. that it was tolerated by *Portugal*, *Tuscany*, *Naples*, *Sicily*, *the Pope*, *Genoa*, *Sardinia*, *Venice*, and *Denmark*. We do not find a contrary practice in the remaining states of Europe, *Holland*, *Sweden*, *Prussia* and *Austria*. We do not know what their practice is, but none of them have complained. It has therefore become the usage of nations; and congress, in the year 1781, by their resolve, declared the United States to be bound by the usage of nations. The practice is also approved by *Galliani*, in his treatise on the duties of nations and princes towards each other, p. 443. by *Azuni*, 2 *Azuni*, 326. and by *Lampredi*, on the commerce of neutrals in time of war, p. 192. The quotation from Lampredi, in *Wheelwright* v. *Depeyster*, 1 *Johns. Rep.* 481. is incorrect; it makes him speak a language different from his sentiments. 2 *Azuni*, 254, 255.

The inconveniences of the contrary practice would be very great. If the captors are obliged to carry the prize a great way out of her course for adjudication, the risk of the seas is great, and the loss of the voyage inevitable. It will be a temptation to the captors to plunder the vessel and destroy her, and perhaps expose the prisoners to great dangers, by sending them adrift in the boat, or subjecting them to severe imprisonment.

The commissioners of England established at Lisbon and Leghorn had no power to adjudicate or condemn.

They could only examine the prisoners on oath, and in certain cases restore the property captured.

In our partial war with France, we carried our prizes into neutral ports; and during the war with Tripoli, our cruisers were authorized by an act of congress to carry their prizes into neutral ports.

The treaty with France cannot be construed strictly. It must be expounded by the law and usage of nations.

There is no reason why the *res ipsa*, the *corpus*, should be within the territory. It is not that which gives jurisdiction.

*The principle which confines jurisdiction of prizes to the courts of the captor, is the right which the sovereign has to inquire into the conduct of his subjects, and to enforce the law of nations. 2 *Rutherford*, 566. Sir W. Scott holds the same doctrine *totidem verbis*. 3 *T. R.* 330. *Smart* v. *Wolff*. * 260

It is but of late that a condemnation has been holden necessary to transfer the property.

3. But Spain was an ally in the war with St. Domingo, although she might not be an ally as to the war with England. The treaty between France and Spain, of August 19th, 1796, created an alliance offensive and defensive as to whatever concerned the mutual advantage of the two nations, and contained a guaranty of the islands.(a) *(*New Annual Register for* 1796, p. 167.) * 261

(a) EXTRACT FROM THE NEW ANNUAL REGISTER, 1796, PAGE 167. PUBLIC PAPERS.

Treaty of Alliance, offensive and defensive, between the French Republic and the King of Spain, August 19, 1796.

The Executive Directory of the French Republic, and his Catholic Majesty, the King of Spain, animated by the wish to strengthen the bonds of amity and good understanding happily re-established between France and Spain by the treaty of peace concluded at Basle, on the 4th Thermidor, in the third year of the Republic, (22d July, 1795,) have resolved to form an offensive and defensive treaty of alliance, for whatever *concerns the advantage and common defence* of the two nations; and they have charged with this important negotiation, and have given their full powers to the undermentioned persons, namely: The Executive Directory of the French Republic, to Citizen Dominique Catharine Perignon, General of Division of the Republic, and its ambassador to his catholic majesty, the King of Spain; and his catholic majesty, the King of Spain, to his excellency, Don Manuel de Godoi, Prince of Peace, Duke of Alcudia, &c. &c. &c. who,

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When one part of the nation separates from the other, and seeks to maintain its independence by force of arms, a war subsists *de facto*, and the *casus fœderis* has arisen.

after the respective communication and exchange of their full powers, have agreed on the following articles:

I. There shall exist for ever *an offensive and defensive alliance* between the French Republic and his catholic majesty the King of Spain.

II. The two contracting powers shall be mutual *guarantees, without any reserve or exceptions*, in the *most authentic and absolute way*, of all the states, territories, islands, and other places which they possess, and shall respectively possess. And if one of the two powers shall be in the sequel, *under whatever pretext it may be, menaced or attacked*, the other promises, engages, and binds itself to *help it with its good offices*, and to *succour it on its requisition as shall be stipulated in the following articles.*

III. Within the space of three months, reckoning from the moment of the *requisition*, the power called on shall hold in readiness, and place in the disposal of the power calling, fifteen ships of the line, three of which shall be three deckers, or of 80 guns, and twelve from 70 to 74; six frigates of a proportionate force, and four sloops or light vessels, all equipped, armed and victualled for six months, and stored for a year. These naval forces shall be assembled by the power called on, in the particular port pointed out by the power calling.

IV. In case the requiring power may have judged it proper for the commencement of hostilities to confine to the one half the succour which was to have been given in execution of the preceding article, it may, at any epoch of the campaign, call for the other half of the aforesaid succour, which shall be furnished in the mode and within the space fixed, this space of time to be reckoned from the new requisition.

V. The power called on shall in the same way place at the disposal of the requiring power, within the space of three months, reckoning from the moment of the requisition, eighteen thousand infantry and six thousand cavalry, with a proportionate train of artillery, ready to be employed in Europe, and for the defence of the colonies which the contracting powers possess in the Gulf of Mexico.

VI. The requiring power shall be allowed to send one or several commissioners, for the purpose of assuring itself whether, conformably to the preceding articles, the power called on has put itself in a state to commence hostilities on the day fixed with the land and sea forces.

VII. These succours shall be entirely placed at the disposal of the requiring power, which may have them in the ports and on the territory of the power called on, or employ them in expeditions it may think fit to undertake, *without being obliged to give an account of the motives by which it may have been determined.*

VIII. The demand of the succours stipulated in the preceding articles, made by one of the powers, shall suffice to prove the need it has of them, without its being necessary to enter into any discussion relative to the question, whether the war it proposes be offensive or defensive, *or without any explanation being required*, which may tend to elude the most speedy and exact accomplishment of what is stipulated.

The *guaranty of the islands was against all men, traitors as well as enemies. The revolt of the negroes was a matter which concerned both nations. It was

IX. The troops and ships demanded shall continue at the disposal of the requiring power during the whole continuance of the war, without its incurring in any case any expense. The power called on shall maintain them in all places where its ally shall cause them to act, as if it employed them directly for itself. It is simply agreed on, that, during the whole of the time when the aforesaid troops or ships shall be on the territory or in the ports of the requiring power, it shall furnish from its magazines or arsenals whatever may be necessary to them, in the same way and at the same price as it supplies its own troops and ships.

X. The power called on shall immediately replace the ships it furnishes, which may be lost by accidents of war or of the sea. It shall also repair the losses the troops it supplies may suffer.

XI. If the aforesaid succours are found to be, or should become, insufficient, the two contracting powers shall put on foot the greatest forces they possibly can, as well by sea as by land, against the enemy of the power attacked, which shall employ the aforesaid forces either by combining them, or by causing them to act separately, and this conformably to a plan concerted between them.

XII. The succours stipulated by the preceding articles shall be furnished *in all the wars* the contracting powers may have to maintain, even in those in which the party called on may not be directly interested, and may act merely as a simple auxiliary.

XIII. In the case in which the motives of hostilities being prejudicial to both parties, they may declare war with one common assent against one or several powers, the limitations established in the preceding articles shall cease to take place, and the two contracting powers shall be bound to bring into action against the common enemy the whole of their land and sea forces, and to concert their plans so as to direct them towards the most convenient points, either separately or by uniting them. They equally bind themselves, in the cases pointed out in the present article, not to treat for peace unless with one common consent, and in such a way as that each shall obtain the satisfaction which is its due.

XIV. In the case in which one of the powers shall act merely as an auxiliary, the power which alone shall find itself attacked may treat of peace separately, but so as that no prejudice may result from thence to the auxiliary power, and that it may even turn as much as possible to its direct advantage. For this purpose advice shall be given to the auxiliary power of the mode and time agreed on for the opening and sequel of the negotiations.

XV. Without any delay there shall be concluded a treaty of commerce on the most equitable basis, and reciprocally advantageous to the two nations, which shall secure to each of them with its ally a marked preference for the productions of its soil or manufactures, or at least advantages equal to those which the most favoured nations enjoy in their respective states. The two powers engage to make instantly a common cause to repress and annihilate the maxims adopted by any country whatever, which may be subversive of their present principles, and which may bring into danger the safety of the neutral flag, and the respect which is due to it, as well as to raise and re-

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equally the interest of both that they should be suppressed.

*263 *The trading with the revolted slaves was in itself a violation of the law of nations. It is immaterial whether it be a violation of a municipal law, or of the rights of war. A vessel may be lawfully seized and condemned *264 *as prize for a violation of the law of nations, whether there be war or not. A French prize court does not come into existence, nor cease, with a war, but, like our district courts, always exists as a prize court.

The arretes of Le Clerc, Ferrand, &c. were mere proclamations; not laws, but declarations of what the law was before. The vessel was as liable to seizure

establish the colonial system of Spain on the footing on which it has subsisted, or ought to subsist, conformably to treaties.

XVI. The character and jurisdiction of the consuls shall be at the same time recognised and regulated by a particular convention. The conventions anterior to the present treaty shall be provisionally executed.

XVII. To avoid every dispute between the two powers, they shall be bound to employ themselves immediately, and without delay, in the explanation and development of the 7th article of the treaty of Basle, concerning the frontiers, conformable to the instructions, plans and memoirs which shall be communicated through the medium of the plenipotentiaries who negotiate the present treaty.

XVIII. England being the only power against which Spain has direct grievances, the present alliance shall not be executed unless against her during the present war, and Spain shall remain neuter with respect to the other powers armed against the republic.

XIX. The ratifications of the present treaty shall be exchanged within a month from the date of its being signed.

Done at St. Ildephonso, 2d Fructidor, (August 19,) the 4th year of the French Republic, one and indivisible.

(Signed) PERIGNON and the PRINCE OF PEACE.

The Executive Directory resolves on and signs the present offensive and defensive treaty of alliance with his catholic majesty, the King of Spain, negotiated in the name of the French Republic by Citizen Dominique Catharine Perignon, General of Division, founded on powers to that effect by a resolution of the Executive Directory, dated 20th Messidor, (September 6,) and charged with its instructions

Done at the national palace of the executive directory, the 4th year of the French Republic, one and indivisible.

Conformable to the original,

(Signed) REVEILLIERE LEPAUX, President.

By the executive directory,

LAGARDE, Secretaire General.

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after she had got out of the territorial jurisdiction, as if she had violated a blockade. Rose v. Himely.

Whether it be a case of prize of war, or of municipal cognisance, the court had a right to order a sale before condemnation, and a purchaser under such sale gained a good title against all the world. The sale was made under the order of the court by its authorized agent.

The communications of the French ministers *Pichon* and *Turreau* to our government, consider this trade as a violation of the law of nations, and our government has considered it in the same light. If it was only a violation of the municipal law of France, this country must have been prostrated *in dust and ashes*, when congress passed a law to carry into effect the municipal law of France. But the truth is, that if this government had not put a stop to the trade, it would have sanctioned a violation of the law of nations.

In the Baltimore case, the court ought to have left the jury to decide, under all the circumstances of the case, whether the brigands had such a title to the property as to make a valid sale to the plaintiffs. The purchase was made only a few months after the slaves had driven out or murdered all the whites, and had confiscated their property. The probability is, that this very property was the property of the whites, obtained by plunder and robbery. If so the robbers gained no title. It was, therefore, a matter of fact for the jury to decide.

But the principal question, whether a French court can condemn a prize lying in a neutral port, is to be determined, not by adjudged cases in one nation only, but by the law and practice of the civilized maritime *nations of Europe. It has been shown to be the practice of most, if not of all the maritime nations of Europe for a century; and if *we* have no practice on the subject, and are now called upon to establish one, it will certainly be our interest to conform to that of Europe. * 265

This is a civil war of the most odious kind; slaves against their masters. It is said, indeed, that they were free. But the same power which had declared them free, had since declared them to be *slaves*. But whether

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they are to be considered as free rebels, or as revolted slaves, *we* had no right to trade with them.

There are duties which one state owes to another in the case of rebellion. If a nation joins or assists the rebels, it becomes an enemy. Upon this point, authorities are not necessary. Reason alone is sufficient. The United States have never acknowledged the independence of Hayti; and the citizens of the United States have no right to consider it as an independent nation.

A law of a nation regulating the trade of foreigners in the territory of that nation, is not a municipal law, but a modification of the law of nations. By the law of nations, every state has a right to regulate the trade of foreigners with that state, and every such regulation is only a modification of that law.

To succour rebels is as much a violation of the law of nations, as to succour a blockaded port, or a besieged city.

A prize may be condemned while lying in a neutral port, or at the bottom of the sea, or even if the thing be consumed.

The condemnation does not give property; it only establishes the fact that the captor or his sovereign had a lawful title by the capture. 1 *Wilson*, 211. 2 *Azuni*, 262. 12 *Mod.* 134. *Rex* v. *Broom.* *Carthew*, 398. S. C.

*266 *The owner of goods captured can only resort to the courts of the captor for redress. *Doug.* 614. *Le Caux* v. *Eden.* No other nation can interfere. He has no right to apply to the courts of his own country, even if his goods are carried there. Neutrals cannot interfere; if they do, they make themselves parties in the war.

The treaty of alliance bound Spain to assist France against the revolted slaves. *Vattel* (p. 234. b. 2. s. 197.) says, "An ally ought doubtless to be defended against *every invasion*, against every foreign violence, *and even against his rebellious subjects.*" A Spanish port was, therefore, to be considered as a port of an ally.

A neutral, whose property has been seized for violation of the law of nations, has no right to rescue it. He may

escape with it if he can; but there is no *jus postliminii* in favour of neutrals.(*a*)

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The court at Santo Domingo was the sole judge of its own jurisdiction. Its decision upon that point is conclusive upon this court.

The questions of *jus postliminii*, and *infra præsidia*, and of 24 hours' possession, can only arise in a case *between the recaptor and the first owner, or between the latter and a vendee of the captor. As between the captor and the captured, the title passes by the seizure. A condemnation is only *evidence* of the lawfulness of the seizure. But it is not the only evidence. This doctrine is acknowledged by all the nations of Europe, except England. But England cannot make the law of nations. *Grotius*, p. 580, 581. b. 3. c. 6. s. 2, 3. tit. 4. *Vattel*, p. 570. b. 3. s. 195, 196. 212. p. 585. *Burlemaqui*, (*last part*,) p. 222. s. 13, 14. *Lee on Captures*, 68, 69, 70. 73. 76. 101, 102. *Jus postliminii* does not arise with regard to moveable goods, except ships; but a belligerent acquires the right to immoveable things, immediately upon capture. 1 *Emerigon*, 4to. ed. (*French*,) p. 513. 2 *Azuni*, 236. 238. *Lee on Captures*, p. 64. c. 5. 1 *Rob.* 114. The reason of a distinction being taken between ships and other moveables, is, that the identity and title of a ship may be as certainly traced as that of land; and there is the same reason for the rule *caveat emptor*.

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If the title to all foreign merchandise is to be thus questioned, it will be necessary to trace it up, in all instances, to the original manufacturer, or to the cultivator

(*a*) MARSHALL, Ch. J. Do you contend that, after its escape, the captor may proceed to libel and condemn the property in the courts of the captor?

Martin. Unquestionably. The property vests by the capture.

JOHNSON, J. Is not a neutral vessel, captured as prize for a breach of the law of nations, *quoad hoc* an enemy, and as much entitled to rescue herself as an open enemy?

Martin. No. The offended nation would have a right to demand that she be given up by her government; and if it refuses, it sanctions the inimical act of its subject, and makes itself a party in the war. So if the seizure be for violation of a municipal law, the government of France has a vested right; but not if there be no seizure. If an American neutral vessel, not having a commission therefor, should assist in rescuing another neutral American vessel from a belligerent who had seized her as prize for violation of the law of nations, she would be guilty of piracy.

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of the soil. No purchaser will be safe. Such are not the principles of the common law.

A sale under a *fieri facias* is good, although the judgment be afterwards reversed. 3 *Bl. Com.* 448, 449. So in Maryland, although the statute forbids an administrator to sell the slaves of his intestate, if there be sufficient other personal estate to pay the debts, yet if in violation of that law he sells the slaves, the title of the purchaser is good.

Even a municipal seizure vests the title in the government. 5 *Mod.* 193. *Roberts* v. *Withered. Comb.* 361. 12 *Mod.* 92. 5 *T. R.* 112. 117. *Wilkins* v. *Despard.*

But the purchaser, at all events, is entitled to salvage. While the property was in the hands of the captor, it was totally lost to the owner, who ought at all events to repay to the purchaser his purchase-money, with interest,

* 268 *and the expense of transportation to this country.

March 2.

MARSHALL, Ch. J. delivered the opinion of the court.

This is a claim for a cargo of coffee, &c. which, after being shipped from a port in *Santo Domingo*, in possession of the *brigands*, was captured by a French privateer, and carried into *Barracoa*, a small port in the island of *Cuba*, where it was sold by the captor. The cargo, having been brought by the purchaser into the state of South Carolina, was libelled in the court of admiralty, by the original American owner. The purchaser defends his title by a sentence of condemnation pronounced by a tribunal sitting in *Santo Domingo*, after the property had been libelled in the court of *this* country; and by an order of sale made by a person styling himself delegate of the French government of Santo Domingo at *St. Jago de Cuba.*

The great question to be decided is,

Was this sentence pronounced by a court of competent jurisdiction?

At the threshold of this interesting inquiry, a difficulty presents itself, which is of no inconsiderable magnitude. It is this:

Can this court examine the jurisdiction of a foreign tribunal?

The court pronouncing the sentence, of necessity decided in favour of its jurisdiction; and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country.

This proposition certainly cannot be admitted in its full extent. A sentence, professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted *body, or by a body not empowered by its government to take cognisance of the subject it had decided, could have no legal effect whatever. * 269

The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into; and its authority to decide questions, which it professes to decide, must be considered.

But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed, may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example; in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative.

Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to

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a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.

*270 *Passing from principle to authority, we find, that in the courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the subject matter.

This general *dictum* is explained by particular cases.

The case of the *Flad Oyen*, 1 *Rob.* 114. was a vessel condemned by a belligerent court sitting in a neutral territory; consequently, the objection to that sentence turned entirely on the defect in the constitution of the court.

The Christopher, 2 *Rob.* 173. was condemned while lying in the port of an ally. The jurisdiction of the court passing the sentence was affirmed, but no doubt seems to have been entertained, at the bar, or by the judge himself, of his right to decide the question, whether a court of admiralty sitting in the country of the captor could take jurisdiction of a prize lying in the port of an ally. The decision of the tribunal at *Bayonne*, in favour of its own jurisdiction, was not considered as conclusive on the court of admiralty in England, but that question was treated as being perfectly open, and as depending on the law of nations.

The case of *The Kierlighett*, 3 *Rob.* 82. is of the same description with that of *The Christopher*, and establishes the same principle.

In the case of *The Henrick and Maria*, 4 *Rob.* 35. *Sir W. Scott* determined that a condemnation, by the court of the captor, of a vessel lying in a *neutral* port, was conformable to the practice of nations, and, therefore, valid; but in that case the right to inquire whether the situation of the thing, the *locus in quo*, did not take it out of the jurisdiction of the court, was considered as unquestionable.

*The case of *The Comet*, 5 *Rob.* 255. stands on the same principles.

The Helena, 4 *Rob.* 3. was a British vessel captured by an Algerine corsair owned by the Dey, and transferred to a Spanish purchaser by a public act in solemn manner before the Spanish consul. The transfer was guarantied by the Dey himself. The vessel was again transferred to a British purchaser under the public sanction of the judge of the viceadmiralty court of Minorca, after that place had surrendered to the British arms. On a claim in the court of admiralty by the original British owner, Sir W. Scott affirmed the title of the purchaser, but expressed no doubt of the right of the court to investigate the subject.

The manner in which this subject is understood in the courts of England, may then be considered as established on uncontrovertible authority. Although no case has been found in which the validity of a foreign sentence has been denied, because the thing was not within the ports of the captor, yet it is apparent that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed not only in relation to the constitutional powers of the court, but also in relation to the situation of the thing on which those powers are exercised; at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. It is, therefore, at present, considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case.

In pursuing the inquiry, then, whether the tribunal erected in *St. Domingo* was acting on a case of which it had jurisdiction when *The Sarah* was condemned, this court will examine the constitutional powers of that tribunal, the character in which it acted, and the situation of the subject *on* which it acted.

*Admitting that the ordinary tribunal erected in *St. Domingo* was capable of acting as a prize court, and also of taking cognisance of offences against regulations purely municipal, it is material to inquire in which *272

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character it pronounced the sentence of condemnation in the case now under consideration.

In making this inquiry, the relative situation of *St. Domingo* and France must necessarily be considered.

The colony of *St. Domingo*, originally belonging to France, had broken the bond which connected her with the parent state, had declared herself *independent*, and was endeavouring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and *St. Domingo*. It has been argued that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of *Vattel* have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to *courts*. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.

It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign who is endeavouring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the
*273 law, and of the proceedings under it, will *decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations.

Let the acts of the French government which relate to this subject be inspected.

The notification given by Mr. *Pichon*, the French

charge d'affaires to the American government, which was published in March, 1802, interdicts all manner of intercourse with the ports of *St. Domingo*, in possession of the revolted negroes, and declares that "cruisers will arrest all foreign vessels *attempting* to enter any other port, and to communicate with any of the revolted negroes, to carry either ammunition or provisions to them. Such vessels," he adds, "shall be confiscated, and the commanders severely punished, as violating the rights of the French republic, and the law of nations."

It might be questioned, under this notice, whether vessels sailing on the high seas, having traded with one of the brigand ports, would be considered as liable to seizure and to confiscation, after passing the territorial jurisdiction of the government of *St. Domingo*. A free trade with that colony had been allowed, and the revocation of that license is made known to the government of the United States. To its revocation the ordinary rights of sovereignty alone were sufficient. The notification, however, refers to the order of the commander in chief of the French republic in *St. Domingo*; and that order would of course be examined as exhibiting more perfectly the extent and the nature of the rights which the French Republic purposed to exercise.

The particular order which preceded this notification is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the republic riding at anchor in the ports of the island not designated by these presents, or within the bays, creeks, and landing places on the coast, or under sail at a less *distance than two leagues from the coast, and communicating with the land, shall be forfeited." * 274

The next decree is dated the 22d of June, 1802, and the extract which is supposed to regulate this particular subject, is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the republic anchored in one of the ports of the island not designated by the present decree, or in the bays, coves, or landings of the coast, or under sail at a less distance than two leagues from the coast, and communicating with the land, shall be arrested and confiscated."

Nothing can be more obvious than that these are strictly territorial regulations, proceeding from the sovereign power of St. Domingo, and intended to enforce sove-

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reign rights. Seizure for a breach of this law is to be made only within those limits over which the sovereign claimed a right to legislate, in virtue of that exclusive dominion which every nation possesses within its own territory, and within such a distance from the land as may be considered as a part of its territory. This power is the same in peace and in war, and is exercised according to the discretion of the sovereign. The prohibition and the penalty are the same on French and foreign vessels.

This subject was again taken up in October, 1802, in an *arrete*, which in part regulates the coasting trade of the island. The 4th, 5th and 6th articles of this decree respect foreign as well as French vessels, and subject them to confiscation in the cases which are there enumerated.

These are all of the same description with those stated in the *arrete* of the 22d of June; and no seizure is authorized but of vessels found within two leagues of the coast.

The last decree is that which was issued by *General Ferrand* on the 1st of March, 1804. This deserves the more attention, because it is that on which the courts profess to found their sentence of condemnation, in the particular case under consideration, and because *General* *275 *Ferrand* uses expressions which clearly indicate the point of view in which all these *arretes* were contemplated by the government of the island.

The title of this *arrete* is, "An *arrete* relative to vessels taken in contravention of the dispositions of the laws and regulations concerning French and foreign commerce in the colony."

In stating the motives for this ordinance, it is said, "That some French agents in the neighbouring and allied islands had mistaken the application of the laws and regulations concerning vessels taken in contravention, upon the coasts of St. Domingo occupied by the rebels, and had confounded those prizes with those which were made upon the enemy of the state." "Desiring to put an end to all the abuses which might result from this mistake, and which would be as injurious to the territorial sovereignty as to the rights of neutrality," the commander in chief, after some further recitals, which are not deemed

material, ordains the law under which the tribunals have proceeded.

The distinction between seizures made in right of war, and those which are made for infractions of the commercial regulations established by the sovereign power of the state, is here taken *in terms;* and that legislation, which was directed against vessels contravening the laws and regulations concerning French and foreign commerce in the colony, is clearly of the latter description.

The first article of this *ordonnance* is recited in the sentence, as that on which the condemnation is founded. It is in these words:

"The port of Santo Domingo is the only one in the colony of St. Domingo that is open to the French and foreign commerce; in consequence, all vessels anchored in the bays, harbours, and landing places, on the coast occupied by the rebels; those cleared for the ports in their possession coming out with or without a cargo, and, generally, all vessels sailing in the territorial extent of the island, (except that from Cape Raphael to *Ocoa bay,) * 276
found at a distance less than two leagues from the coast, shall be detained by the state vessels and privateers having our letters of marque, who shall conduct them, if possible, into the port of *Santo Domingo*, that the confiscation of the said vessels and cargoes may be pronounced."

As this article authorizes a seizure of those vessels only which are "sailing within the territorial extent of the island, found within less than two leagues of the coast," it is deemed by the court to be sufficiently evident that the seizure and confiscation are made in consequence of a violation of municipal regulation, and not in right of war. It is true, that the revolt of the colony is the motive for this exercise of sovereign power. Still it is an exercise of sovereign power, restricting itself within those limits which are the province of municipal law, not the exercise of a belligerent right.

The tribunal professing to carry this law into execution, though capable of sitting either as a prize or an instance court, must be considered in this case as acting in the character of an instance court, since it is in that character that it punishes violations of municipal law.

The Sarah was captured more than *ten* leagues from

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the coast of St. Domingo, was never carried within the jurisdiction of the tribunal of that colony, was sold at Barracoa, in the island of Cuba, and afterwards condemned as prize under the *arrete* of *General Ferrand*, which has been stated.

If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded.

Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom
*277 the authority is derived, they are not regarded *by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.

Thus the sentence of a court sitting in a neutral territory, and instituted by a belligerent, has been declared not to change the property it professed to condemn; and thus the question whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been fully examined, and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of nations.

Since courts, who are required to decide whether the condemnation of a vessel and cargo by a foreign tribunal has effected a change of property, may inquire whether the sentence was pronounced by a court which, according to the principles of national law, could have jurisdiction over the subject, this court must inquire whether, in conformity with that law, the tribunal sitting at St. Domingo to punish violations of the municipal laws enacted by its sovereign, could take jurisdiction of a vessel seized on the high seas, for infracting those laws, and carried into a foreign port.

In prosecuting this inquiry, the first question which presents itself to the mind is, what act gives an inchoate jurisdiction to a court?

It cannot be the offence itself. It is repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*. Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all concerned *are parties to it. But the owners of vessels navigating the high seas, or lying in port, cannot take notice of any proceedings which may be instituted against those vessels in foreign countries; and, consequently, such proceedings would be entirely *ex parte*, and a sentence founded on them never would be, and never ought to be, regarded. *278

The offence, then, alleged to have been committed by *The Sarah* could not be cognisable by the court of St. Domingo, until some other act was performed which should make the owners of the vessel and cargo parties to the proceedings instituted against them, and should place them within the legitimate power of the sovereign, for the infraction of whose laws they were to be confiscated. There must, then, be a seizure, in order to vest the possession of the thing in the offended sovereign, and enable his courts to proceed against it. This seizure, if made either by a civil officer, or a cruiser acting under the authority of the sovereign, vests the possession in him, and enables him to inquire, by his tribunals constituted for the purpose, into the allegations made against, and in favour of, the offending vessel. Those interested in the property which has been seized are considered as parties to this inquiry, and all nations admit that the sentence, whether correct or otherwise, is conclusive.

Will a seizure *de facto*, made without the territorial dominion of the sovereign under cover of whose authority it is made, give a court jurisdiction of a thing never brought within the dominions of that sovereign?

This is a question upon which considerable difficulty has been felt, and on which some contrariety of opinion

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exists. It has been doubted whether proceedings, denominated judicial, are, in such a case, merely irregular, or are to be considered as absolutely void, being *coram non judice*. If merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world; if *coram non judice*, the sentence is as if not pronounced.

* 279 *It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorize. The person who makes this seizure, then, makes it on a pretext which, if true, will not justify the act, and is a marine trespasser. To a majority of the court it seems to follow, that such a seizure is totally invalid; that the possession, acquired by this unlawful act, is his own possession, not that of the sovereign; and that such possession confers no jurisdiction on the court of the country to which the captor belongs.

This having been the fact in the case of The Sarah, and neither the vessel, nor the captain, supercargo, nor crew, having ever been brought within the jurisdiction of the court, or within the dominion of the sovereign whose laws were infracted, the jurisdiction of the court over the subject of its sentence never attached, the proceedings were entirely *ex parte*, and the sentence is not to be regarded.

The case of The Helena, already cited, may at first view be thought a case which would give validity to any seizure wherever made, and would refer the legality of that seizure solely to the sovereign of the captor. But on a deliberate consideration of that case, the majority

of the court is of opinion that this inference is not warranted by it. Several circumstances concurred in producing *the decision which was made, and those circumstances vary that case materially from this. The captured vessel was carried into port, and while in the power of the sovereign was transferred by his particular authority in solemn form. * 280

In such a case, Sir William Scott conceived that a sentence of confiscation conformably with the laws of Algiers, was to be presumed. But his decision did not turn singly on this point. The vessel, after passing in this formal manner to a Spanish purchaser, had, with equal solemnity, been again transferred to a British purchaser; and the judge considered this second purchaser, with how much reason may perhaps be doubted, as in a better situation than the original purchaser. This case is badly reported; the points made by counsel on one side are totally omitted, and the opinion of the judge is not given with that clearness which usually characterizes the opinions of Sir William Scott. But the seizure was presumed to be made by way of reprisals for some breach of the treaty between the two powers, so that the possession of the captor was considered as legitimately the possession of his sovereign, and from the subsequent conduct of the Dey himself, a condemnation according to the usages of Algiers was presumed.

But in presuming a condemnation, this case does not, it is thought, dispense with the necessity of one; nor is it supposed, in presuming a legitimate cause of seizure, to declare that a seizure made without authority, by a commissioned cruiser, would vest the possession in the sovereign of the captor, and give jurisdiction to his courts.

If this case is to be considered as if no sentence of condemnation was ever pronounced, the property is not changed, and this court, having no right to enforce the penal laws of a foreign country, cannot inquire into any infraction of those laws. The property in this particular case was purchased under circumstances which exclude any doubt respecting its identity, and respecting the full knowledge of the purchaser of the nature of the title he acquired.

*The sentence of condemnation being considered as * 281

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null and invalid, the property is unchanged, and, therefore, ought to be recovered by the libellants in the court below. But those libellants ought to account with the defendants for the freight, insurance, and duties on importation, and for such other expenses as would have been properly chargeable on themselves as importers; and each party is to bear his own costs.

The sentence of the circuit court is to be reversed, and also the sentence of the district court, so far as it contravenes this opinion, and the cause is to be remanded to the circuit court for the district of South Carolina, for a final decision thereon.

LIVINGSTON, J. Without expressing an opinion on the invalidity of a seizure on the high seas under a municipal regulation, if the property be immediately carried into a port of the country to which the capturing vessel belongs, and there regularly proceeded against, I concur in the judgment just delivered, because The Sarah and her cargo were condemned by a French tribunal sitting at St. Domingo, without having been carried into that, or any other French port, and while lying in the port of Charleston, South Carolina, whither they had been carried, by and with the consent of the captor.

CUSHING and CHASE, Justices, concurred in opinion with Judge *Livingston*.

JOHNSON, J. This cause comes up on appeal from the circuit court of South Carolina, acting in the capacity of an instance court of admiralty. The doctrines which regulated the decision of the circuit court are not overruled by a majority of the bench; but the decree of that court is rescinded, because to three of the five judges who concur in sustaining the appeal, it appears that the property could not be condemned in the court of St. Domingo, while lying in a neutral port; and to the other two, that the capture on the high seas, for a breach of municipal regulation, was contrary to the law of nations, and, therefore, vested no jurisdiction in the court of St.
* 282 Domingo. On the former doctrine it is not *necessary to make any observations, because in the case of the *Sea Flower*, argued together with this as one cause, and

decided on the same day, that doctrine is expressly overruled. But on the latter point I think it proper, briefly to state the reasons upon which I found my disapprobation, both of the doctrine and of its application to this case.

It would have been some relief to us in determining this question, had it been made a point by counsel, either in their argument in this court or in the court below; but it appears to have been wholly unnoticed by them.

Most of the difficulties which have occurred in the investigation of this case, appear to have resulted from an indistinct view of the nature, origin, and object of prize courts. Conducted by the same forms, and very generally blended in the same persons, it is not easy to trace upon the mind, the discriminating line between the *instance* and *prize* courts; yet the object of the institution of the latter court, when considered, strongly marks the distinguishing point between them. In its ordinary jurisdiction, the admiralty takes cognisance of mere questions of *meum* and *tuum* arising between individuals; its extraordinary or prize jurisdiction is vested in it for the purpose of revising the acts of the sovereign himself performed through the agency of his officers or subjects. A seizure on the high seas by an unauthorized individual is a mere trespass, and produces no change of right, but such a seizure made by sovereign authority, vests the thing seized in the sovereign; for the fact of possession must have all the beneficial effects of the right of possession, as the justice or propriety of it cannot be inquired into by the courts of other nations. But as this principle might leave the unoffending individual a prey to the rapacity of cruisers, or a victim to the errors of those who even mean well, and as every civilized nation pretends to the character of justice and moderation, and to have an interest in preserving the peace of the world, they constitute courts with powers to inquire into the correctness of captures made under colour of their own authority, and to give redress to those who have been unmeritedly attacked or injured. These are denominated prize courts, and the primary *object of their institution is to inquire whether a taking as prize is sanctioned by the authority of their sovereign, or the unauthorized act of an individual. From this it would seem to follow,

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that the decision of such a court is the only legal organ of communication through which the sanction of a sovereign can be ascertained, and that no other court is at liberty to deny the existence of sovereign authority, for a seizure which a prize court has declared to be the act of its sovereign.

The propriety of such an act may correctly become the subject of executive or diplomatic discussion; but the equality of nations forbids that the conduct of one sovereign, or the correctness of the principles upon which he acts, should be submitted to the jurisdiction of the courts of another. From these considerations I infer, that the capture and continued possession of *The Sarah* and her cargo, confirmed by the approbatory sentence of a court of the capturing power, vested a title in the claimant, which this court cannot, consistently with the law of nations, interpose its authority to defeat.

Having briefly stated the grounds upon which I originally formed, and now adhere to, an opinion in favour of the claimants, I will consider the objections stated to the jurisdiction of the court, on the ground that the seizure was contrary to the law of nations.

It is admitted, if the court of St. Domingo had jurisdiction of the subject matter, that the condemnation completed the devestiture of property. But it is contended that the subject, in this case, was not within their jurisdiction, because it was seized for a cause not sanctioned by the law of nations. I am unfortunate enough to think that neither the premises nor the conclusion of this argument are maintainable. The conclusion is subject to this very obvious objection, that it defeats the very end for which such courts were created.

To contend that a violation of the law of nations will take away the jurisdiction of a court, which sits and judges according to the law of nations, appears to approach very near to a solecism. The occurrence which gives it jurisdiction takes it away.

* 284 *If the object and end of constituting a prize court be to give redress against unlawful capture, and, as the books say, in such case to restore *velis levatis*, how can it make reparation to the injured individual if it loses its jurisdiction; because there has been an injury done to him, the court can give him no redress. The argument admits, that a capture consistent with the law of nations,

would give jurisdiction, but how is the legality or illegality of a capture to be determined, unless a court can take jurisdiction of the case. The legality of the capture is the very point to which a court is to direct its inquiries, and yet that inquiry is arrested in its inception. The cause or circumstances of a capture can never be known to a court, without exercising jurisdiction on the subject. To maintain, therefore, that prize courts can only exercise jurisdiction over captures, made consistently with the law of nations is, in effect, to deprive them of *all* jurisdiction, since it leaves no means of deciding the question on which their jurisdiction rests.

But the premises which lead to this conclusion, will be found no less exceptionable than the conclusion itself; and the propriety of taking into consideration the questions which form those premises very questionable. The opinion of those of my brethren who maintain this doctrine, is founded upon two propositions.

1. That a nation cannot capture, on the high seas, a vessel which has within her territories, committed a breach of a municipal law.

2. That the condemnation in this case was grounded on an offence against a municipal law.

To me it appears wholly immaterial on what grounds the decision be founded, if the case be within their jurisdiction. Indeed, this is fully admitted by those of the court, who maintain the doctrine that I am considering; but under the idea of examining the jurisdiction of the court, they appear to me to go farther and examine into the correctness of its decision. I do not deny that there are circumstances material to the effect of sentences of foreign prize courts, into which other courts may *inquire. * 285
The authorities quoted on this point relate exclusively to two, viz.

1. Whether the court is held in the territory of the sovereign who constitutes it.

2. Whether the subject *sub potestate* of the sovereign whose courts condemned it.

These circumstances have an immediate relation to the existence of the court, and of its power of acting upon the subject; but within its legitimate scope of action, the correctness of its proceedings, or of the rules of decision by which it is governed, cannot, in the nature of things, and consistently with the idea of perfect

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equality and independence, be subjected to the review of other courts.

The decisions of such courts do not derive their effect from their abstract justice; they are in this respect analogous to the acts of sovereignty. They are universally conclusive, because nowhere subject to revision. Among nations they are considered as entitled to the same validity as the decisions of municipal courts, within their respective territories, and preclude the rights of parties, although contrary to every idea of law, reason and evidence.

The court of St. Domingo being a court of co-ordinate authority with this, was equally competent to decide a question of jurisdiction arising under the law of nations. Had the question whether a seizure under municipal law, upon the high seas, was contrary to the law of nations, or, if contrary to the law of nations, whether the court could not therefore exercise jurisdiction upon it, been brought to the notice of that court, it is presumed that their decree would not have been void, because they maintained the negative of the proposition. Had it been made a question before that court, whether the laws of France authorized the capture of The Sarah at ten leagues distance from the coast, or whether in fact the vessel was not seized within two leagues of the coast, it is presumed that their decision upon these points would have been conclusive, whatever may be
* 286 the impresion *of this court from the evidence now before us. It is impossible for this court to pretend to a knowledge of all the facts by which the decree of that court may have been regulated. The decree itself shows that the whole evidence is not before us; but if it were, that court is sole arbiter, both of the effect of testimony, and the credibility of witnesses. A similar observation may be made with regard to the laws of France which much pains has been taken to prove, did not authorize this capture. How can this court be supposed to know all the laws, sovereign orders or received principles which regulate the decisions of foreign courts. Such courts are best acquainted with the laws of their own government, and their decision upon the existence or effect of those laws must, in the nature of things, be conclusive in the eyes of other nations. Suppose that other courts were so far at liberty

as to review the grounds upon which such decrees *profess* to proceed, the insufficiency of those grounds would not be conclusive against the correctness of such decisions, because they may be maintainable upon other grounds, not noticed, or even not known to the judge who pronounces them.

But if we are to look into the grounds upon which a decree is professedly founded, extravagant as that upon the case of The Sarah is said to be, there is one view in which it may admit of justification. General Ferrand, in *his* preamble, declares it to be his leading object to remove the contrariety of opinion which existed among the officers of government relative to existing laws, respecting captures of vessels taken upon the coasts of St. Domingo. If their judges thought proper to consider this arrete as only declaratory of pre-existing laws, and that the words in the first article, "ceux expedié pour les portes en leur possession en sortant avec ou sans chargement," authorized the capture of vessels outward bound, I know no reason that *we* can have to declare it a misconstruction or incorrect opinion, or, if incorrect, to nullify their decree on that account. The conclusiveness of a foreign sentence appears to be at an end, the moment other courts undertake to look into the cause for which a capture was made. If the possession of the captor is the possession of his sovereign, and his courts have a right therefore to adjudicate property captured, *or carried into a foreign port, it appears to me to be immaterial on what ground the capture is made. The fact of dispossession by sovereign authority, judicially ascertained, deprives all other courts of the right to act upon the case. * 287

Upon these considerations I have adopted the opinion that we are not at liberty to enter into the inquiry whether the capture of The Sarah was made in pursuance of belligerent or municipal rights. But if we are to enter into the inquiry, I am of opinion that the evidence before us plainly makes out a case of belligerent capture, and, though not so, that the capture may be justified, although for the breach of a municipal law.

In support of my latter position, both *principle* and the *practice* of Great Britain and our own government may be appealed to.

The ocean is the common jurisdiction of all sovereign

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powers; from which it does not result that their powers upon the ocean exist in a state of suspension or equipoise, but that every power is at liberty upon the ocean to exercise its sovereign right, provided it does no act inconsistent with that general equality of nations which exists upon the ocean. The seizure of a ship upon the high seas, after she has committed an act of forfeiture within a territory, is not inconsistent with the sovereign rights of the nation to which she belongs, because it is the law of reason, and the general understanding of nations, that the offending individual forfeits his claim to protection, and every nation is the legal avenger of its own wrongs. Within their jurisdictional limits the rights of sovereignty are exclusive; upon the ocean they are concurrent. Whatever the great principle of self defence in its reasonable and necessary exercise will sanction in an individual in a state of nature, nations may lawfully perform upon the ocean. This principle, as well as most others, may be carried to an unreasonable extent; it may be made the pretence instead of the real ground of aggression, and then it will become a just cause of war. I contend only for its reasonable exercise. The act of Great Britain, of the 24 Geo. III. c. 47. is predicated upon these principles. It subjects
*288 vessels to *seizure, which approach with certain cargoes on board, within the distance of four leagues of her coast, because it would be difficult, if not impossible, to execute her trade laws, if they were suffered to approach nearer in the prosecution of an illicit design. But if they have been within that distance, they are afterwards subject to be seized on the high seas. They have then violated her laws, and have forfeited the protection of their sovereign. The laws of the United States upon the subject of trade, appear to have been framed in some measure after the model of the English statutes; and the 29th section of the act of 1799, expressly authorizes the seizure of a vessel that has, within the jurisdiction of the United States, committed an act of forfeiture, wherever she may be met with by a revenue cutter, without limiting the distance from the coast. So also the act of 1806, for prohibiting the importation of slaves, authorizes a seizure beyond our jurisdictional limits, if the vessel be found with slaves on board, hovering on the coast; a latitude of expres-

sion that can only be limited by circumstances, and the discretion of a court, and in case of fresh pursuit, would be actually without limitation. Indeed, after passing the jurisdictional limits of a state, a vessel is as much on the high seas as if in the middle of the ocean; and if France could authorize a seizure at the distance of two leagues, she could at the distance of twenty.

But the capture of The Sarah may fairly be considered as an exercise of belligerent right, and strictly analogous to seizure for breach of blockade. The right of one nation to exclude all others from trading with her territories, exists equally in war and in peace. Had the exclusion in this case been merely calculated for the interests of trade, it may have been considered as purely municipal. But there existed a war between the parent state and her colony. It was not only a fact of the most universal notoriety, but officially notified in the gazettes of the United States, by the proclamation of the French resident M. Pichon, who at the same time publishes the prohibition to trade with the revolters, with a declaration that seizure and confiscation should be the consequence of disobedience to this prohibition. Here, then, was notice of the existence of war, and an assertion *of the rights consequent upon * 289
it. The object of the measure was not the promotion of any particular branch of agriculture, manufacture, or commerce, but solely the reduction of an *enemy*. It was therefore not merely municipal, but belligerent in its nature and object. If France had a right to subdue the revolted colony, she had an undoubted right to preclude all nations from supplying them with the means of protracting the war. To confine her to her own jurisdictional limits, in the exercise of those acts of force which were necessary to carry into effect her right of excluding neutrals, would be a mere mockery, when by the very state of things she was herself shut out from those limits. Seizure on the high seas for a breach of the right of blockade, during the whole return voyage, is universally acquiesced in as a reasonable exercise of sovereign power. The principle of blockade has indeed in modern times been pushed to such an extravagant extent as to become a very justifiable cause of war, but still it is admitted to be consistent with the law of

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nations, when confined within the limits of reason and necessity. The right to subdue an enemy, carries with it the right to make use of the necessary means for that purpose, and the individual who does an act inconsistent with the rights of a belligerent, exposes himself to the liability to be treated as an enemy. The belligerent nation can exercise the same acts of violence against him, that she can against an individual of her enemy. Nor can his sovereign protect an individual who has committed an aggression upon belligerent rights without becoming a party to the contest.

The argument drawn from the decree of Ferrand, to prove that France had not asserted her belligerent rights, is evidently founded upon a mistranslation. The sentence which authorizes the seizure of vessels when outward bound, after having entered the ports of St. Domingo, is *substantive*, and totally unaffected by the subsequent sentence, which authorizes a seizure of vessels sailing within two leagues of the coast. The former authorizes capture for the offence of having entered those ports; the latter, for being found in a situation from which an intention to commit that offence shall be inferred. Nor, if the fact were so, that she had limited the right of capture to two leagues from
* 290 her coast, would *it follow that this was an exercise of municipal right; because a nation may restrict her subjects, in the exercise of belligerent rights, to a certain distance from the coast, or even to her jurisdictional limits, and yet the character of the seizure would be in no wise changed. If the object of the seizure is to promote the reduction of an enemy, it is an exercise of the rights of war.

From these considerations I conclude that the capture of The Sarah was justifiable upon principles not at all dependent upon municipal regulation; that it may fairly be considered as having been made in conformity with the law of nations, and, therefore, without acceding to the doctrine that a seizure contrary to the law of nations was a void seizure, and that we have a right to declare that a mere marine trespass which a court of France has declared to be the act of its sovereign, I conclude that the court of St. Domingo had jurisdiction in this case; and if it had jurisdiction, it is admitted

that the property was altered, and the libellant ought not to recover.

Let it be observed that this is not an application on behalf of the vendee of the captor for the aid of this court to secure to him the benefit of his purchase. We find him in possession, and the application is for our aid to devest that possession, and restore it to the original owner. This owner was clearly an offender against the rights of France, and his only claim upon the interference of this court is, that he had escaped, with the property thus acquired, beyond two leagues from the shore of the nation that he had offended. In such a case it would be enough, for all the purposes of the defendant, if this court would imitate the state of our nation, and remain neutral between the parties.

Let it not be supposed that the opinion which I am giving devotes the commerce of our country to lawless depredation. My observations are applied to a case in which an evident aggression has been committed, by entering at least two of the interdicted ports of St. Domingo. The individual who will knowingly violate the rights of war, or laws of trade of another nation, is well apprized that he forfeits all claim to the protection of his country, or the interference of its courts. The peace of *the nation, and the interests of the fair trader, imperiously require that the smuggler, or the violator of neutrality, should be left to his fate. * 291

If I had no other reason to satisfy my mind of the correctness of the doctrines that I have been contending for, a conviction of their importance to the peace and security of the mercantile world would alone induce me to maintain them. The purchase of these goods was made in a Spanish port, under sanction of an agent of the French government, apparently countenanced by the government of the country in which he acted, and is sanctioned by a condemnation. If in the purchase of articles of merchandise in a foreign port, under the sanction of sovereign authority, it is nevertheless necessary, in order to acquire a good property, that a merchant should know whether they were captured by law, or without law, under the law of nations, or under municipal law, the office of a lawyer will be as necessary to his education as the counting house. Articles of commerce passing from hand to hand by mere delivery,

Rose v. Himely.

often remaining for years in the same packages, distinguished by the same marks, may admit of identification after any length of time, in the remotest countries, and in the hands of the most innocent purchasers. But if a seizure by a sovereign, upon a ground which any court may adjudge unsanctioned by the law of nations, is tantamount to no seizure, and nothing done in pursuance of it can transfer a good property, where is the uncertainty to end? With regard to ships the inconvenience may not be so great. Every merchant knows that a vessel must be accompanied with her document papers, so that the purchaser may come to the knowledge of her having passed through a capture and condemnation, and be put on his guard against so precarious a title. He will know that he is liable to be dispossessed according to the varying construction of the law of nations that may prevail in different countries; yet he knows the full value of a property thus embarrassed. But in the purchase of merchandise he has no security, unless indeed he purchases them immediately from the manufacturer or the planter. It is a subject of curious speculation how far the pursuit or research after merchandise thus situated may be carried; whether the same principle may not extend it into the
* 292 *hands of the retailer or even the consumer. In one of the cases arising out of the capture of The Sarah, I mean that against Groning, the property is libelled in the hands of a purchaser without notice, after it was landed in this country. If we can go so far, I see not where we are to stop. Every subsequent purchaser, even the remotest, as far as the article will admit of identification, is in no better situation than the defendant Groning, and liable, upon the same principle, to be dispossessed. After going beyond the fact of seizure by sovereign authority within his own territory, (where he is supreme,) or upon the ocean, (where he is equal to all others,) unaffected by escape, recapture or release, (by which property is restored to its state before seizure,) the approbatory sentence of his own court, (by which alone it can be judicially known to be the act of the sovereign,) beyond these limits every step that a court takes can only be productive of doubt, litigation and uncertainty, and involve the commercial world in endless embarrassment, at the same time that it compromits the peace of na-

tions, among whom it is a received and correct opinion, that a want of due deference to the jurisdiction of their maritime courts is a just cause of war.

Sentence of the Court, March 2, 1808.

This cause came on to be heard on the transcript of the record, and on sundry exhibits introduced into the case in this court, and was argued by counsel, on consideration whereof, it appearing that The Sarah with her cargo were seized without the territorial jurisdiction claimed by the French government of St. Domingo, for the breach of a municipal regulation, and having never been carried within that jurisdiction, were sold by the captor in a foreign port, and afterwards condemned by the court of St. Domingo, as having violated the laws for regulating the commerce of French and foreign vessels with that colony, which laws authorize a seizure of vessels found within two leagues of the coast; it is the opinion of the court, that the seizure of The Sarah and her cargo is to be considered as a marine trespass, not vesting the possession in the sovereign of the captor, or *giving jurisdiction to the court * 293
which passed the sentence of condemnation, and, therefore, that the said sentence did not change the property in The Sarah and her cargo, which ought to be restored to the plaintiffs, the original owners, subject to those charges of freight, insurance and other expenses which would have been incurred by the owners in bringing the cargo into the United States, which equitable deductions the defendants are at liberty to show in the circuit court. This court is, therefore, of opinion, that the sentence of the circuit court of South Carolina ought to be reversed, and the cause be remanded to that court, in order that a final decree may be made therein, conformably to this opinion.

HUDSON AND OTHERS *v.* GUESTIER, AND LAFONT *v.* BIGELOW.

If a vessel, seized by a French privateer, within the territorial jurisdiction of the government of St. Domingo, for breach of the French municipal law prohibiting all intercourse with certain ports in that island, be carried by the captors directly to a Spanish port in the island of Cuba, she may, while lying there, be lawfully proceeded against and condemned by a French tribunal sitting at Guadaloupe.

THESE cases were argued in connection with that of *Rose* v. *Himely*.

MARSHALL, Ch. J. delivered the opinion of the court, as follows:

This case differs from that of Rose v. Himely in one material fact. The vessel and cargo which constitute the subject of controversy were seized *within the territorial jurisdiction of the government of St. Domingo*, and carried into a *Spanish* port. While lying in that port, proceedings were regularly instituted in the court for the *island of Guadaloupe*; the cargo was sold by a provisional order of that court, after which the vessel and cargo were condemned. The single question, therefore, which exists in this case is, did the court of the captor lose its jurisdiction over the captured vessel by its being carried into a Spanish port?

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The possession of the sovereign of the captors, gives jurisdiction to his courts. The possession of the captors in a neutral port is the possession of their sovereign. If the possession be lost by *recapture*, *escape*, or *voluntary discharge*, the courts of the captor lose the jurisdiction which they had acquired by the seizure.

*The seizure was indisputably a valid seizure, and vested the lawful possession of the vessel in the sovereign of the captor. The right consequently existed in full force to apply immediately to the proper tribunals for an examination of, and decision on, the offence alleged to have been committed. The jurisdiction of those tribunals had attached, and this right to decide upon the offence was complete.

When a seizure is thus made for the violation of a municipal law, the mode of proceeding must be exclusively regulated by the sovereign power of the country, and no foreign court is at liberty to question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice. Recapture, escape, or a voluntary discharge of the captured vessel, would be such a circumstance, because the sovereign

The trial of a municipal seizure must be regulated exclusively by municipal law. No foreign court can question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice.

would be thereby deprived of the possession of the thing, and of his power over it. While this possession remains, the *res* may be either restored or sold, the sentence of the court can be executed, and therefore this possession seems to be the essential fact on which the jurisdiction of the court depends.

The laws of the United States require that a vessel which has been seized for violating them should be tried in the district where the offence is committed, and certainly it would be irregular and illegal for the tribunal of a different district to act upon the case. But of this irregularity, it is believed, no foreign court could take notice. The United States might enable the admiralty courts of one district to decide on captures made for offences committed in another district. It is an internal regulation to be expounded by our own courts, and of which the law of nations can take no notice. The possession of the thing would be in the sovereign power of the state, and it is competent to that power to give jurisdiction over it to any of its tribunals. There exists a full power over the subject, and an ability to execute the sentence of the court. The sovereign power possessing jurisdiction over the thing, must be presumed by foreign tribunals to have exercised that jurisdiction properly. But if the *res* be out of the power of the sovereign, he cannot act upon it, nor delegate authority to act upon it to his courts.

*If these principles be correct, it remains to inquire whether the Brig Sea Flower remained in the possession and in the power of the sovereign of the captor after being carried into a Spanish port. * 295

Had this been a prize of war, we have precedents and principles which would guide us. The cases cited from Robinson's Reports, and the regulations made by Louis XVI. in November, 1779, show that the practice of condemning prizes of war while lying in neutral ports has prevailed in England, and has been adopted in France. The objections to this practice may perhaps be sufficient to induce nations to change it by common consent, but until they change it the practice must be submitted to, and the sentence of condemnation passed under such circumstances will bind the property, unless the legislature of the country in which the captured vessel may be claimed, or the law of nations, shall otherwise direct.

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The sovereign whose officer has in his name captured a vessel as prize of war, remains in possession of that vessel, and has full power over her, so long as she is in a situation in which that possession cannot be rightfully devested. The fact whether she is an enemy vessel or not ought, however, to be judicially inquired into and decided, and therefore the property in a neutral, captured as an enemy, is never changed until sentence of condemnation has passed; and the practice of nations requires that the vessel shall be in a place of safety before such sentence can be rendered. In the port of a neutral she is in a place of safety, and the possession of the captor cannot be lawfully devested, because the neutral sovereign, by himself or by his courts, can take no cognisance of the question of prize or no prize.

This position is not intended to apply to the case of a sovereign bound by particular treaties to one of the belligerents; it is intended to apply only to those neutrals who are free to act according to the general law of nations. In such case the neutral sovereign cannot wrest from the possession of the captor a prize of war brought into his ports.

A vessel captured as prize of war is, then, while lying in the port of a neutral, still in the possession of the sovereign *of the captor, and that possession cannot be rightfully devested.

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It is objected that his courts can take no jurisdiction of a vessel under such circumstances, because they cannot enforce a sentence of restitution.

But it is to be recollected that the possession of the captor is in principle the possession of his sovereign; he is commissioned to seize in the name of the sovereign, and is as much an officer appointed for that purpose, as one who in the body of a county serves a civil process. He is under the control and direction of the sovereign, and must be considered as ready to obey his commands legally communicated through his courts.

It is true that in point of fact cruisers are often commanded by men who do not feel a due respect for the laws, and who are not of sufficient responsibility to compensate the injuries their improper conduct may occasion; but in principle they must be considered as officers commissioned by their sovereign to make a seizure in the particular case, and to be ready to obey

the legitimate mandate of the sovereign directing a restitution. The property, therefore, may be restored while lying in a neutral port, and whether it may, or may not not be sold in the neutral port, the condemnation without a sale may change the property, if such condemnation be valid.

In cases of prize of war, then, the difficulty of executing the sentence does not seem to afford any conclusive argument against the jurisdiction of the court of the captor over a vessel in possession of the captor, but lying in a neutral or friendly port.

Do the same principles apply to a seizure made within the territory of a state for the violation of its municipal laws?

In the solution of this question the court can derive no aid from precedent. The case, perhaps, has only occurred in the wars which have been carried on since the year 1793, and the court in deciding it finds itself reduced to the necessity of reasoning from analogy.

*The seizure, it has been already observed, vests the possession in the sovereign of the captor, and subjects the vessel to the jurisdiction of his courts. The vessel, when carried into a foreign port, is still in his possession, and he is as capable of restoring it if the offence should not have been committed, as he is of restoring a neutral vessel unjustly captured as an enemy. The sentence in the one case may be executed with as much facility as in the other. * 297

Possession of the *res* by the sovereign has been considered as giving the jurisdiction to his court; the particular mode of introducing the subject into the court, or, in other words, of instituting the particular process which is preliminary to the sentence, is properly of municipal regulation, uncontrolled by the law of nations, and, therefore, is not examinable by a foreign tribunal. It would seem, then, that the principles which have been stated as applicable in this respect to a prize of war, may be applied to a vessel rightfully seized for violating the municipal laws of a nation, if the sovereign of the captor possesses the same right to maintain his possession against the claim of the original owner in the latter as in the former case. If, on a libel filed by the original owner in the courts of the country into which the vessel might be brought, the possession could be defended by alleging that she was seized for the violation of a muni-

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cipal law, and the right of the court to decide the cause would be thereby defeated, then that possession would seem to be sufficiently firm to maintain the jurisdiction of the courts of the captor.

Upon this point much doubt has been entertained. It is, however, the opinion of a majority of the judges, that a possession thus lawfully acquired, under the authority of a sovereign state, could not be devested by the tribunals of that country into whose ports the captured vessel was brought; at least that it could not be devested unless there should be such obvious delay in proceeding to a condemnation as would justify the opinion that no such measure was intended, and thus convert the seizure into a trespass.

The judgment of the circuit court is to be reversed.

* 298 *CHASE and LIVINGSTON, Justices, dissented from the opinion of the court in these cases, because the vessel, which was seized for the violation of a French arrete, or municipal regulation, was not brought into any port of France for trial, but was voluntarily carried by the captain of the privateer to St. Jago de Cuba, a Spanish port, and while lying there was, with her cargo, condemned as forfeited by a French tribunal sitting at *Guadaloupe*.

JOHNSON, J. I concur in the reversal of the decision in the court below, but on different grounds from those which influence the opinion of my brethren. I had occasion in the case of The Sarah to express my ideas on most of the points arising in this case, and to that opinion I refer for the reasons of my present conclusion.

To me it appears immaterial whether the capture was made in exercise of municipal or belligerent rights, or whether within the jurisdictional limits of France, where she is supreme, or beyond those limits and upon the high seas, where her authority is concurrent with that of every other nation. We find the property in possession of the captor under authority derived from his sovereign, whose conduct cannot be submitted to our jurisdiction.

The modern practice of nations sanctions the condemnation of vessels lying in a foreign port, and that practice is not inconsistent with principle.

The plaintiff below has lost all remedy at law, and

must look elsewhere for redress if he has sustained an injury. Hudson et al. v. Guestier.

☞ Note. *The cases of* Palmer and Higgins *v.* Dutilh, *and* Hargous *v.* The Brig Ceres, *being imperfectly stated, it not being ascertained whether the seizure was within or without the territorial jurisdiction of St. Domingo, were remanded for further proceedings.*

*ALEXANDER *v.* HARRIS, BAILIFF OF CRAMMOND. * 299

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of replevin.

Avowry by the defendant, stating that Crammond was seised in fee of the *locus in quo*, and demised the same to the plaintiff for the term of *three years*, at a certain rent, and that because 111 dollars and 67 cents of the rent were in arrear and unpaid, he acknowledged the taking as bailiff of Crammond, &c. and prays judgment for double rent.

Plea, ought not to avow, &c. because, he says, that the said sum of 111 dollars and 67 cents of the rent aforesaid, at the time when, &c. was not in arrear and unpaid to the said W. Crammond, nor was any part thereof in arrear, &c. and this he prays may be inquired of by the country, &c.

On the trial the defendant produced a letter from the plaintiff, to the defendant's agent, agreeing to take the house for one year, at the rent of 120 dollars, payable half yearly, and proved by witnesses that the plaintiff took the house upon the terms mentioned in the letter, and remained in possession three years; that at the end of the first year no new express agreement was made, but the plaintiff continued in possession with the consent of the defendant's agent. The letter did not contain any agreement for renewing the lease at the end of the term by consent of the parties; whereupon, at the prayer of the defendant, the court below instructed the jury that if they believed, from the evidence, that the plaintiff took the house for one year, by his letter, and afterwards, with the consent of the defendant's agent, continued to hold

An averment of a demise for *three* years, is not supported by proof of a lease for one year certain, and two years further possession on the same terms by consent of the landlord.

The plea of *no rent arrear*, admits the demise as laid in the avowry.

The court is bound to give judgment for *double rent* under the statute of Virginia.

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the house for two years longer under the letter, and without any new agreement, then the defendant is entitled to recover on his avowry; but that if the terms of the letter were relinquished, and a new agreement made for the two years, the avowry was not supported by the evidence.

* 300 *The plaintiff also produced to the court, after the verdict was rendered for the rent in arrear as stated in the avowry, the replevin bond given by the plaintiff, as evidence to satisfy the court, that the defendant had distrained for more rent than he had avowed for, and more than the jury had found in arrear, and objected to the rendition of judgment for double rent under th statute. But the court overruled the objection, and rendered judgment for double the rent found in arrear by the verdict.

To which opinions of the court the plaintiff excepted, and the verdict and judgment being against him, he brought his writ of error.

E. J. Lee, for the plaintiff in error, contended,

1. That it was necessary that the landlord, on the issue of *no rent arrear*, should prove his title in fee, according to the averment in the avowry.

2. That he should prove the demise as laid; and that the evidence in the present case did not prove the demise stated in the avowry; and,

3. That the landlord was not entitled to double rent, because it appeared by the penalty of the replevin bond given by the tenant, which was more than double the rent avowed for, that the landlord had distrained for more rent than was actually due. In support of these points he cited *Esp. N. P.* 358. *Doug.* 640. *Bristow* v. *Wright*, and the *Virginia Laws*, *New Rev. Code*, 155.

Hiort and *Youngs*, contra.

A lease for a year, and so from year to year, if the tenant occupies for three years, may be laid as a demise for three years. 1 *T. R.* 378. *Birch* v. *Wright*. 4 *Bac. Abr.* 182.

The bill of exceptions does not state that it contains the whole evidence offered at the trial.

The replevin bond was the act of the plaintiff himself, and he might gratuitously give a bond in a larger pe-

nalty *than the law requires. The act of assembly says it shall be *at least* in double the amount of the rent distrained for, but does not say it shall not be in a greater sum. Besides, the bond does not appear in the record. Alexander v. Harris.

The plaintiff's plea to the avowry does not deny the avowant's title, nor the demise. It is simply the plea of *no rent arrear*, which admits the title and the demise, as laid in the avowry. By taking issue upon the rent arrear, the plea admits every other allegation in the avowry of the defendant. But if it does not, it is not competent for the tenant who has enjoyed the land, to dispute the title under which he held. In ejectment, possession alone is a good title against all but the rightful owner. If the plaintiff would deny the demise as laid, he must plead *non-tenure*. 4 *Bac. Abr.* 8. 55. 64. 67. 71. 87. 104. 10 *Viner*, 486.

E. J. Lee, in reply.

If the defendant was not owner of the land, no rent was in arrear *to him*. The avowant must prove his case as laid. The case of *Birch* v. *Wright* is not like this, and the opinion of Judge Buller is extrajudicial.

MARSHALL, Ch. J. The only doubt is, whether the plea of *no rent arrear* admits the demise as laid in the avowry.

E. J. Lee. *Nothing in arrear* is the general issue in an action of debt for rent; and, like the pleas *nil debet*, *non detinet*, and *not guilty*, puts the avowant upon the proof of his whole case. *Cowp.* 588. *Warner* v. *Theobald*. *Buller's N. P.* 302.

March 2.

MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

In this case two errors are alleged by the plaintiff in error.

1st. That the circuit court misdirected the jury.

*2d. That judgment for double damages ought not to have been rendered on the verdict. *302

1. The avowry, which sets forth the title under which

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the distress was made, states a lease for three years certain. The plea to this avowry was, "nothing in arrear," and on this plea issue was joined. At the trial of the cause, the avowant gave in evidence a lease for one year certain, and a subsequent possession for two years. On motion to instruct the jury that this lease did not support the avowry, the court said, that if the jury should be of opinion that the subsequent possession was under the original contract, and without any new agreement, then the avowant was entitled to recover, otherwise not. The jury found a verdict for the avowant.

The lease stated in the avowry is obviously a different lease from that which was given in evidence. A lease for three years is not a lease for one year. But it is contended that a subsequent possession, without any new express agreement, amounts to an extension of the original lease, and for this Bacon's Abridgment, and a dictum of *Judge Buller*, in the case of *Birch* v. *Wright*, 1 *Term Rep.* 378. have been cited. But those cases do not prove the point they were supposed to establish. In those cases, the original terms of the lease admit of the extension which was afterwards made by consent of parties. The lease was made for one year, and afterwards from year to year, as long as both parties should please. The principle of continuance is introduced into the original contract, and the occupation for three years is evidence that the circumstance had occurred, by force of which the contract should be a lease for three years. But in this case the original contract contains no principle of continuance. It is for a limited time, and can only be extended by a new contract, either express or implied. The lease, therefore, offered in evidence, does not support the avowry. But a question on which the court has felt more difficulty is this; Does the plea admit the demise, or is the avowant bound to prove it? If the plea admits the demise, then, notwithstanding the variance, the verdict is right, and *the court has not erred in that part of the opinion which is against the party taking the exception.

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The issue gives notice to the parties of the point which is to be tried, and which the testimony must support. That which is admitted by the pleadings need not be proved. If the plea in this case controverts the allegation in the avowry, that the tenant held under a lease for

three years, reserving the rent stated to be reserved, then the avowant would be bound to prove the demise as laid. But if the plea admits the demise, then the avowant is not bound to prove it. The plea is, that the sum distrained for of the rent aforesaid, (that is, of the rent claimed under the lease stated in the avowry,) was not in arrear and unpaid, nor was any part thereof in arrear and unpaid, at the time when the distress was made, as the avowant in his avowry hath alleged.

This plea avers the single proposition that the rent was not in arrear when the distress was made, and it is this averment alone that the party making the distress is to meet. The averment that the rent claimed in the avowry was not in arrear when the distress was made, admits the contract by which the rent might accrue, and only denies that any thing, at the time of the distress, remained due upon that contract. Upon principle, then, it would seem that the plea had dispensed with proof of the demise laid in the avowry, by admitting it.

No case has been found in which the point has been expressly decided. It is said in *Buller's Nisi Prius*, p. 59. "If the plaintiff plead *riens arrere* in bar to an avowry, he cannot, upon such issue, give in evidence *non-tenure*;" consequently, the defendant cannot be required to show the tenure; for if it was necessary to show it, the tenant would be at liberty to produce opposing testimony.

It is also laid down in *Buller*, p. 166. that in covenant for non-payment of rent, *riens in arrear*, or payment, at the day, is a good plea; but *riens in arrear* generally, *would not be a good plea; and the reason appears to be, that *riens in arrear* generally admits the breach laid in the declaration, and that the rent was not paid on the day. This principle is decided in *King* v. *Saville*, reported by *Brownlow*. Nothing in arrear on the day on which the rent is stated to have accrued, seems to be considered as equivalent to payment on the day; but nothing in arrear on a subsequent day admits that the covenant was broken, and, consequently, admits the covenant. It is not a good plea, because it admits the right of the plaintiff to recover damages. This furnishes a strong argument in favour of the opinion that nothing in arrear on the day when the distress was made, admits that the rent accrued as stated in the avowry.

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The case of *Warner* v. *Theobald, Cowper*, 588. was an action of debt for rent, by an assignee against an assignee. The plea of *riens in arrear* was demurred to, and, consequently, the question to be decided by the court was, not what the plea admitted, but whether it was a bar to the action. Mr. Buller objected to this plea, because the plaintiff could not come prepared to know what it would be necessary to prove. The defendant might object to the assignment, or give in evidence payment before or after action brought.

In answer to *Buller*, *Wood* said, "The form of the plea is *nil debet*, in the present tense. But in this case *riens in arrere* is a fairer plea than *nil debet*; because *nil debet puts the whole declaration in issue*, whereas *this confines the question to the single fact whether such rent was due.*"

In giving his opinion in support of the plea, Lord *Mansfield* certainly had not in view the question now under consideration; for he uses expressions which would apply differently to that question. He says, "Saying nothing is due is the same as if he had said *nil debet*;" and immediately adds, "Besides, it is a more favourable plea for the plaintiff. He must then have applied the first assertion solely to the sufficiency of the plea as a bar, for it could not be a more favourable plea for the
* 305 plaintiff, if it contested the whole declaration, *and admitted nothing, as is the case with *nil debet.*" He concludes with observing, "If the rent *was* due, and *is* not at the time of the plea, it could not have ceased to be due by the plaintiff's accepting it."

This case appears to the court to decide nothing further than that the plea pleaded was a good bar to the declaration in debt for rent, and to leave the question, how far it admits the demise laid in the avowry, open for consideration.

It is thought important in the inquiry, that the law appropriates a different plea, which controverts the demise, if the tenant means to contest it—the plea of *non demisit.*

The court is of opinion that the plea admits the demise; and that there is no error in the instruction given to the jury which is injurious to the party taking the exception.

In the judgment for double damages, there is no error. The law directs it positively.

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Judgment affirmed, with costs.

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*CHAPPEDELAINE, Residuary Legatee, AND CLOSRIVIERRE, Adm'r *de bonis non*, } Of CHAPPEDELAINE, Complainants,
against
DECHENAUX, Executor of DUMOUSSAY, Defendant.

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ERROR to the circuit court for the district of Georgia, in a suit in equity.

If an account stated be pleaded in bar to a bill in equity, such plea will be sustained, except so far as the complainant shall show it to be erroneous.

The bill states that the complainants' testator and the defendant's testator, together with three others, viz. *Boisfeillet*, *Du Bignon*, and *Grand Closmesle*, became joint purchasers of the islands of *Sapelo*, *Blackbeard*, *Jekyll*, and *half of St. Catharine*, on the coast of Georgia; that Dumoussay was the acting partner, and kept all the accounts, &c. That an account was stated and signed by the two testators, Chappedelaine and Dumoussay, on the 30th of April, 1792, by which the former acknowledged a balance of 667*l.* 10*s.* 1. 3-4*d.* due to the latter; but that the account was erroneous in sundry items particularly set forth in the bill; that there were sundry debits which had accrued since that settlement, and that Chappedelaine had been obliged, by a suit in equity, to refund to Boisfeillet a large sum which Dumoussay had overcharged him. That Dechenaux was the executor of the estate of Chappedelaine as well as of Dumoussay, and, as executor of Chappedelaine, had defended the suit of Boisfeillet. The bill contains a prayer that the defendant may account touching all moneys due on rectifying the errors; and for all other sums due by Dumoussay in his lifetime, not credited nor accounted for, or which have come to the hands of the defendant, and that he pay over such balance as shall appear on settlement of all accounts, and for general relief. The defendant pleaded the settled account in bar of so much of the bill as sought to open the account, and by answer denied all fraud and error.

*Upon hearing, the court below ordered a reference to auditors, with directions "to make a general state- *307

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ment of accounts between the parties, rejecting any erroneous charges which may appear in their settlement, and adding such as may have been omitted."

The auditors, on the 23d of April, 1805, instead of stating an account, reported that they found "a balance due from the defendant to the complainants, including interest upon the liquidated account up to this date, fifteen thousand five hundred and eighty-six dollars and twenty-two cents." They stated that they had not taken into consideration a claim of the complainants of 1,000*l.* which the estate of Chappedelaine was condemned to pay to Boisfeillet by decree of the court, nor their claim for indemnity for damages said to have been sustained by sale of lands, conceiving those claims not submitted to them, but reserved for the decision of the court.

Exceptions being taken to this report, the court ordered the auditors to "make a statement showing the items of the general account, which they rejected, in whole or in part, and the reasons of their rejections, and also such items as were added as omissions, and their reasons for so doing."

In obedience to this order, the auditors made an explanatory report, whereupon the court decreed that 604*l.* 6*s.* and 579*l.* 8*s.* 1*d.* be deducted from the liquidated account of the 30th of April, 1792; that interest be allowed on the balance at eight *per cent.* from that date, and that the defendant pay out of the assets that balance and interest, and the further sum of 3,823 dollars, being the amount stated by the auditors as having accrued since the 30th of April, 1792, and costs.

The errors assigned in the record were,

1. That the bill was insufficient in law.

2. That the court had not jurisdiction; because, although the bill states the complainants to be French citizens, and the defendant a citizen of Georgia, yet the two testators were citizens of Georgia.

* 308 *3. That I. Trubert, who is stated in the answer to be residuary legatee of Dumoussay, was not made a party; and because the other legatees were not made parties.

4. That the stated account has been partially opened, and abatements made to the injury of the legatee.

5. That the exceptions to the report of the auditors ought to have been sustained.

P. B. Key, for the defendant, on opening the question of jurisdiction, was stopped by the court.

MARSHALL, Ch. J. The present impression of the court is, that the case is clearly within the jurisdiction of the courts of the United States. The plaintiffs are aliens, and although they sue as trustees, yet they are entitled to sue in the circuit court.

Winder, for the complainants.

As to the allegation of want of parties, it can only be noticed on being pleaded. The defendant cannot now take advantage of it.

We are not, in examining the account, confined to the errors stated in the bill. But if the general nature of the errors is stated in the bill, it is sufficient; and if such errors are proved, it is sufficient to set aside the account as a bar, and to have it referred to auditors; who are not confined to the precise errors alleged in the bill.

MARSHALL, Ch. J. said he understood the practice in chancery to be, that the court will notice only those errors in the report of the auditors which appear upon the face of the report, or those expressly set down in the exceptions; and then the evidence on which the items were allowed must appear on the record.

Harper and *P. B. Key*, for the defendant, contended,

That an account stated and settled by the parties was conclusive, unless the party complaining can show fraud or error; and upon him lies the burden of proof. * 309

That when a defendant relies upon an account stated, he shall never be compelled to go into a general account. The settled account can only be opened to the extent of the items charged as erroneous. 2 *Atk.* 1. *Summer* v. *Thorpe*. 2 *Vez.* 565. *Pitt* v. *Cholmondely*.

March 4.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

The bill in this case is brought to set aside a stated account which was signed by Dumoussay and Chappedelaine, in July, 1792, on the suggestion of fraud on

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the part of Dumoussay; or, if it be not set aside, to correct its errors, and to obtain a settlement of transactions subsequent to that account.

The stated account is pleaded in bar of so much of the bill as requires that the subject should again be opened, and the particular errors assigned, with the exception of one in the addition, are denied in the answer.

That the plea in bar must be sustained, except so far as it may be in the power of the representatives of Chappedelaine to show clearly that errors have been committed, is a proposition about which no member of the court has doubted for an instant. No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labour of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist. Upon this principle, the report of the auditors in this case, and the exceptions to that report, *so far as respects the stated account, are to be considered. * 310

The first exception relates only to the manner in which the auditors understood the order referring the accounts to them, and need not be considered, since the sole inquiry will be, whether they have in fact made any deduction from the stated account which was not warranted by the interlocutory order, an order made on the principles which this court has already declared to be correct.

The second exception refers to the particular deductions made by the auditors. The first is, that the item in the stated account of 604*l.* 6*s.* 5*d.* is reduced to 333*l.* 0*s.* 8*d.*

The stated account between the parties, marked in the proceedings as the exhibit A. contains this item, and states it to be one fifth of the expenses for disbursements on the island of Sapelo, which was the

joint property of a company consisting of five, of which Dumoussay & Chappedelaine were partners. The items which composed this general account are all contained in exhibit F. stated by Dumoussay on the 3d of May, 1792, and assented to by Chappedelaine on the 23d of July, 1792, when the stated account was signed. The total of those disbursements is 4,224*l.* 3*s.* 8. 1-2*d.* and the balance upon the account is 3,021*l.* 12*s.* 1. 1-2*d.* the fifth of which is 604*l.* 6*s.* 5*d.*

In their explanatory report the auditors say that they took as the basis of this reduction an account settled by auditors in a suit decided in the circuit court of Georgia, which was instituted by Boisfeillet, one of the absent partners, against Dechenaux, who was executor both of Dumoussay and Chappedelaine. The auditors in that case were examined, and they depose that their corrections were made on the proof of double entries, false charges, omissions acknowledged by the executor of Dumoussay, and charges not proper to be made against Boisfeillet.

This testimony would of itself be sufficient to convince the court that injustice was done in the settlement of July, 1792, but would not show explicitly the * 311
amount of that injustice, and enable them to say what deductions from that settlement ought to be allowed, because, as was well observed by the counsel for Dechenaux, items might be properly chargeable to Chappedelaine, of which Boisfeillet ought not to bear a part.

The court, therefore, sought, in the documents connected with the report, for that more explicit information.

Upon looking into the exhibit F. there are, upon the face of the paper, obvious errors, which demonstrate the incorrectness of that statement, and the excessive inattention of Chappedelaine.

The first item on the debit side of this exhibit, is the sum of 3,571*l.* 3*s.* 8. 1-2*d.* disbursed for Sapelo. The funds for this disbursement were in part in the hands of Dumoussay, as the remnant of advances previously made by the partners. To this remnant he states himself to have added 2,368*l.* 12*s.* 0. 1-2*d.* from his private funds. On this advance made by himself in Georgia,

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he charges the company 15 *per cent.* amounting to 354*l.* on account of the difference of exchange between money in France and in Georgia, or, as he expresses it, for exchange, freight and insurance.

This charge has been rejected in the accounts of all the partners for many obvious reasons. It is sufficient to observe, that as this money was advanced in Georgia by Dumoussay, and repaid to him in Georgia by the partners, there was as much reason for making these charges on the repayment, as on the original advance; and with respect to Chappedelaine, it is still more inadmissible, because he had previously advanced his portion of this money to Dumoussay, and had allowed him 15 *per cent.* for these charges, in a deduction from that advance, so that this charge, with respect to Chappedelaine, is double.

The third item in this exhibit is a charge of 299*l.* as one year's interest on 2,368*l.* 12*s.* 0. 1-2*d.* This is more than double the real amount of interest.

* 312 *There is also in the credit side of the account, an error of 100*l.* in the addition. The errors apparent on the face of the exhibit F. amount to 611*l.* and these errors are of such a description as strongly to characterize the stated account of July, 1792.

In the account stated by the auditors, there are omissions of moneys received by Dumoussay, and admitted to be chargeable to him in this account with the company, amounting to 189*l.* 10*s.* 10*d.*

The account containing these incontestable errors was submitted to auditors, and still further reduced by them. Several of the small errors which they have detected are perceived, but the whole cannot be traced by this court, without engaging in the laborious task of auditors, which is incompatible with their duties. To that account the executor of Dumoussay, who was also the executor of Chappedelaine, was a party, and had a right, with respect to Boisfeillet, to rely upon the stated account of July, 1792, signed by Chappedelaine, because Chappedelaine was the attorney in fact of Boisfeillet, and because Boisfeillet had sanctioned that settlement, and had assumed the payment of his part. Yet in that case the deductions from that account were made which the auditors in this case have taken as the basis of their settlement, and those deductions were

made in consequence of double entries, false charges, and charges not admissible against Boisfeillet.

The great difficulty in admitting such an account, under such circumstances, consists in the uncertainty of the amount of those charges which were rejected as being inapplicable to Boisfeillet. This difficulty is removed, in a great measure, by inspecting the report in the present case. In that report, the auditors take up the items which were rejected on this principle, and charge them to Chappedelaine; so that, in truth, the alterations made in this item are all founded on errors which the auditors have corrected.

The second item of this exception is, that the auditors reduced the sum of 336*l.* 16*s.* 8*d.* admitted in the stated account, as being one fourth of the purchase and expense of Jekyll, to 311*l.* 9*s.* 6*d.* making a difference of 25*l.* 7*s.* 2*d.*

*This item in the exhibit A. which is the stated account, is the result of the exhibit G. which is the account of Jekyll, as settled between Dumoussay and Chappedelaine. There is an obvious error of 4*l.* 19*s.* 10*d.* in the division of 3*l.* 10*s.* in the hire of negroes, and the residue of the sum deducted is on account of the same charges on the moneys advanced for Jekyll, which were made on the moneys advanced for Sapelo, and which are rejected for the same reasons which were assigned for their rejection in that item of the account. *313

The auditors also reduced the sum of 990*l.* 3*s.* 1*d.* assumed by Chappedelaine for Boisfeillet, to the sum of 410*l.* making a difference of 580*l.* 3*s.* 1*d.* Nothing can be more obvious than the propriety of this reduction. Dumoussay charges Chappedelaine with the debt of Boisfeillet, amounting, as he says, to 990*l.* 3*s.* 1*d.* which Chappedelaine assumes as the attorney of Boisfeillet. In a suit to which the executor of Dumoussay is a party, this debt appears to have been only 410*l.* No man can hesitate to admit that Chappedelaine must have credit with Dumoussay for the difference between the sum alleged to be due, and the sum actually due from Boisfeillet.

The auditors also struck out of the stated account the sum of 554*l.* 9*s.* 4*d.* assumed by Chappedelaine for one of the absent partners, that being considered by

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mistake as the share of that absent partner in the expenses of Sapelo. The sum actually due by that partner was afterwards paid by himself to the executor of Dumoussay. The court is satisfied, from the evidence, that this payment was made to Dechenaux as the executor of Dumoussay. The assumpsit of Chappedelaine was essentially as security for the absent partner, who still remained a debtor; and when the principal did himself pay what he owed to the original creditor, the assumpsit of Chappedelaine was of no further obligation. Although this was not an error in the account when settled, except so far as this charge exceeded the sum with which the absent partner was really chargeable, yet it becomes an item which can no longer be retained as a charge against Chappedelaine, and in reforming *their accounts, it must be excluded from them.

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There is also added to the credits of Chappedelaine the sum of 26*l.* 18*s.* which the auditors state to be the difference between the amount of a receipt given by Dumoussay and the sum actually debited to him in the accounts between the parties.

These several errors make up the sum of 1,457*l.* 8*s.* 4*d.* from which is to be deducted the sum of 667*l.* 10*s.* 1. 3-4*d.* admitted on the stated account to be due from Chappedelaine to Dumoussay. The balance standing to the credit of Chappedelaine would be, on the 30th of April, 1792, 789*l.* 18*s.* 2. 1-4*d.*

The auditors state this balance at 1,346*l.* 10*s.* 7*d.* But from this balance reported by the auditors is to be taken the sum of 305*l.* 13*s.* allowed by Chappedelaine on the repayment in Georgia of money lent by him to Dumoussay in France. This sum has been disallowed by the auditors, but was allowed by the circuit court, and is allowed by this court. This would reduce the report of the auditors to 1,030*l.* 17*s.* 7*d.* exceeding the balance which is here supposed, by the sum of 240*l.* 19*s.* 4. 3-4*d.*

The greatest part of this excess is produced by one third of merchandise sold and not entered in the account, and by a credit for continuing interest up to the 30th of April, 1792, on Chappedelaine's money in the hands of Dumoussay, which credits had been omitted in the stated account without any apparent reason, and

must, therefore, have been among the numerous inaccuracies of that account. The residue of this excess is said by the auditors to be produced by numerous minute errors detected by a laborious investigation of all the accounts between the parties. This court cannot pursue them in that investigation. But in a case so replete with errors, which mark excessive negligence on the one side, and which can scarcely be ascribed to mistake on the other, the court is of opinion that the report of the auditors stating that these corrections were made on the inspection of the vouchers and entries which *were laid before them ought to be received, unless the person taking the exception had himself required the testimony on any particular point to which he objected to be submitted to the court, or had required a special statement from the auditors, exhibiting the reasons for their opinion on the particular point. * 315

The balance due to Chappedelaine on the 30th of April, 1792, is so much of the loan made by him to Dumoussay in France, which remains unpaid. By the contract between the parties, that loan was to carry an interest of six *per cent. per annum* until paid. The court, therefore, cannot consider it as a claim on an unsettled account, or as carrying interest at the rate established in Georgia. It is still governed by the law of the contract, and must carry interest at the rate of six *per cent. per annum.*

To the report, so far as it respects the accounts subsequent to the 30th of April, 1792, a general exception is taken, which is sufficiently repelled by the answer of the auditors. They say, if in the opinion of the defendant below the auditors admitted any charge against Dumoussay which was not sufficiently supported by testimony, he ought to have obtained a special statement from the auditors, or have made a special exception, which would bring the testimony on the particular point before the court. The only objection which the court can notice, is the allegation in the exception that the auditors have proceeded on accounts rendered by Dechenaux, without allowing him a credit which he claimed in those accounts. That credit is the balance appearing to be due to Dumoussay by the stated account of July, 1792. But that balance was entirely changed. The item was fully disproved by

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the testimony laid before the auditors. Dechenaux did not then withdraw his account, and require the plaintiff below to support his claims by other vouchers. It was clearly in the power of the plaintiff to have done this, for he might have forced Dechenaux to produce the entries and vouchers from which he had made out the account exhibited by himself. By leaving this account with the auditors without objection, he acquiesced in their considering as correct the items it admitted.

*316 *This bill was brought to correct the stated account of July, 1792, and to settle the accounts between the parties subsequent to that period. The defendant exhibits the accounts subsequent to that period, but claims to set against them the balance due to his testator under the settlement of 1792. On those subsequent accounts, that balance has no influence. By introducing it into an account he was compellable to render, he cannot destroy the effect of that account. Had he intended to rely on this circumstance, he ought to have made the point before the auditors, and thus have enabled the plaintiff to take other measures to substantiate his claim. The auditors say, they "admitted the account presented by the defendant;" but this must be understood with the exception of the balance which he claimed under the settlement of July, 1792. It does not appear, from their report, that the claims of the plaintiff below rested on that account so far as it went; but it is probable that further research was deemed unnecessary. The court cannot say that in this the auditors erred.

The decree of the circuit court is affirmed, so far as it accords with this opinion, and is reversed as to the residue.

THE UNITED STATES v. M'DOWELL.

In deciding whether the matter in dispute be sufficient to sustain the jurisdiction of this court, it will look to the sum due upon the *condition of the bond*, and not to the penalty.

ERROR to the district court for the district of Kentucky, in an action of debt for *twenty thousand* dollars, the penalty of an official bond given by the defendant, as marshal of that district, for the faithful execution of the

duties of his office by himself and his deputies. The defendant pleaded *performance* generally. The United States, in their replication, assigned a special breach of the condition of the bond, in not paying over to the United States the sum of *three hundred and twenty-eight* *dollars. The judgment below was against the United States, who sued out the present writ of error.

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But *this court*, without argument, decided that it had no jurisdiction, the *matter in dispute* being of less value than 2,000 dollars.

THE MAYOR AND COMMONALTY OF ALEXANDRIA *v.* PATTEN AND OTHERS.

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of debt brought by the mayor and commonalty of Alexandria, for the use of John G. Ladd, against Thomas Patten and his sureties, on a bond given for the performance of his duty as vendue-master.

If the debtor at the time of payment does not direct to which account the payment shall be applied, the creditor may *at any time* apply it *to which account he pleases.*

The object of the suit was to recover a sum of money alleged to remain in his hands as vendue-master on account of goods sold for Ladd. Patten was also the debtor of Ladd for goods sold by him to Patten, who gave in evidence payments which exceeded the amount due upon the latter account, and which, if applied to the former account, would nearly, if not entirely, discharge that debt. The payments were attended by circumstances which the defendants considered as evidence of a clear intention to apply them to the debt due from Patten as *vendue-master*; "whereupon the counsel for the *plaintiffs* prayed the opinion of the court whether, from the manner in which the payments were made as aforesaid, the said John G. Ladd had not a right to apply so much of the money, paid to him as aforesaid, as would discharge the debt due to him as aforesaid, for *goods sold* as aforesaid, to the said Thomas Patten, to the discharge of the same. Whereupon the court instructed the jury, that if they should be satisfied by the evidence that the payments of the money by the defendant Patten were *made on

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account of the goods *sold at vendue*, and so understood by both parties at the time of the payments, they must be applied to that account.

"If Mr. Patten, at the time of paying the money, did not direct to which account it should be applied, and if it was not understood by the parties at the time of payment, on which account it was made, the *plaintiff* had a right *immediately* to make the application to which account he pleased; but such application must have been *recent*, and before any alteration had taken place in the circumstances of Mr. Patten.

"If neither of the parties made the application as aforesaid, and if the parties did not then understand on which account it was made, then the payments ought in law to be applied to the discharge of the *vendue account*, the non-payment of which is alleged as the breach of the bond upon which the present suit is brought."

To this opinion the plaintiffs excepted, and, the verdict and judgment being against them, brought their writ of error.

Swann, for the plaintiffs in error, contended, that where there are different debts due by a debtor to his creditor, and a payment be made generally *on account*, the creditor has a right to apply the payment, *whenever* he pleases, *to which account he pleases*, and cited the case of *Goddard* v. *Cox*, 2 *Stra.* 1194.

Youngs, contra.

It is admitted that the defendant had the right at the time of payment to direct its application, and that if he did not then exercise that right, it devolved upon the plaintiff. But the question is, *when* is the plaintiff to exercise the right? Can he, at any indefinite period after the payment, and under any change of circumstances, apply the payment as he pleases? Can he, at the moment of trial, when the defendant produces evidence of payments, say, I choose to apply these payments to the other account? The rules of law are all founded in reason. Some reasonable limit must be supposed to the *exercise of this right. In the present case the interests of third persons are involved.

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The sureties may have been lulled into security by the evidence of these payments.

The court below was bound to decide according to the laws of Virginia, which have been adopted by congress for the government of the county of Alexandria.

The law is conclusively settled in Virginia, by the highest tribunal in that state, in the case of *Braxton* v. *Southerland*, 1 *Wash.* 133. where the president of the court of appeals, in delivering the opinion of the court, says, "Although, if the debtor neglect to make the application at the time of payment, the election is then cast upon the creditor, yet it is incumbent upon the latter, in such a case, to make a *recent* application, by entries in books or papers, and not to keep parties and securities in suspense, changing their situation from time to time, as his interest, governed by events, might dictate." And upon this principle the decree of the court in that case was founded. It was not a mere *dictum*, but the very ground of the court's decision. This, then, being the law of Virginia, the court below was bound by it.

If the opinion of the court of appeals of Virginia needed support, it would be found in 2 *Pothier on Obligations*, 45. who gives it as a rule of the civil law, that "when the debtor in paying makes no application, the creditor, to whom money is due for different causes, may apply it to the discharge of which he pleases." But he goes on to say, "It is necessary, 1st. That this application should have been made *at the time;* and, 2d. That the application which the creditor makes should be equitable." Another rule, in p. 49. is, that "when the application has not been made either by the debtor or the creditor, the application ought to be made to that debt which the debtor had, at the time, most interest to discharge." And as a *corollary*, he says, "The application is made rather to the debt, for which the debtor has given a *surety*, than to those which he owes alone. The reason is, that in paying the former he discharges himself towards *two* creditors—his principal creditor, and his surety whom he is bound to indemnify."

*These principles are confirmed by 1 *Domat*, 287. tit. *De Solutione.* *320

The case of *Goddard* v. *Cox*, cited for the plaintiffs,

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is a mere *nisi prius* case before Chief Justice *Lee*, in Middlesex; and it only decides the principle, that where a defendant is indebted to the plaintiff on two simple contracts of equal dignity and of the same nature, and for neither of which is any other person bound, and the payment is made generally on account, without any application having been made by the defendant, the right to make the application devolves on the plaintiff. It does not decide the question now before the court, which is, whether the plaintiff is not bound to make a recent application in cases where the interests of sureties are concerned.

All the cases in which the plaintiff has been permitted at law to make his election, are cases where the debts were of equal dignity and of similar nature, and where it did not appear to be important to the debtor, or any other person, to which debt the payment should be applied. *Esp. N. P.* 229.

There is, in truth, no difference in principle between the rule in equity and the rule at law, as to the application of payments.

March 7.

MARSHALL, Ch. J. after stating the case, delivered the opinion of the court, as follows:

It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately. After having made it he is bound by it; but until he makes it he is free to credit either the bond or simple contract.

* 321 *Unquestionably, circumstances may occur, and perhaps did occur in this case, which would be equivalent to the declaration of his election on the part of the debtor, and, therefore, the court was correct in instructing the jury, that if they should be satisfied that the payments were understood to be made on account of the goods sold at vendue, they ought to apply them to the discharge of that account; but in declaring that the election, which they supposed to devolve on the

plaintiff if the application of the money was not understood at the time by the parties, was lost if not immediately exercised, that court erred.

Their judgment, therefore, must be reversed, and the cause remanded for a new trial.

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DAWSON'S LESSEE *v.* GODFREY.

ERROR to the circuit court of the district of Columbia, sitting at Washington.

A person born in England before the year 1775, and who always resided there, and never was in the United States, is an *alien*, and could not, in the year 1793, take lands in Maryland by descent from a citizen of the United States.

Russel Lee, a citizen of the United States, in the year 1793, died seised in fee of a tract of land called *Argyle, Cowall and Lorn*, situated in that part of the district of Columbia which was ceded to the United States by the state of Maryland. Mrs. Dawson, the lessor of the plaintiff, would be entitled to the land by descent, unless prevented by the application of the principle of alienage. She was born in England before the year 1775, always remained a British subject, and was never in the United States.

The court below instructed the jury that she was an alien, and could not take the land by descent from Russel Lee in the year 1793.

The question having been fully argued, but not decided, in the cases of *Lambert's Lessee* v. *Paine*, (*ante*, vol. *3. p. 97.) and *M'Ilvaine* v. *Coxe's Lessee*, (*ante*, vol. 2. p. 280.) the counsel (viz. *Morsell* and *Jones*, for the plaintiff in error, and *P. B. Key*, for the defendant) agreed to submit it to the court without further argument. * 322

JOHNSON, J.(*a*) delivered the opinion of the court, as follows:

This case rests upon the single question, *whether a subject of Great Britain, born before the declaration of independence, can now inherit lands in this country?* The general doctrine is admitted, that in the state of Maryland, in which the land lies, an alien cannot take by descent; but it is contended, upon the doctrine laid

(*a*) The judges present were, *Chase, Johnson, Livingston* and *Todd*.

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down in Calvin's Case, that the rights of the *antenati* of Great Britain formed an exception from the general rule. The point decided in the case of Calvin was, that a Scotsman, born after the union, could inherit lands in England. It is evident that this case is not directly in point, for the only objection here to the right of recovery did not exist in Calvin's Case, as, whether in England or in Scotland, he was equally bound in allegiance to the king of Great Britain. It would be a contradiction in terms to contend that Dawson or his wife ever owed allegiance to a government which did not exist at their birth. It is upon a supposed analogy, therefore, and the reasoning of the judges in Calvin's Case, that the argument for the plaintiff is founded. In the two cases of *Coxe and M'Ilvaine* and *Lambert and Paine*, in this court, this doctrine was very amply discussed, and this case is submitted upon those arguments. The counsel there contended, that the relation of the *postnati* of Scotland (after the union) to the subjects of Great Britain, was identically the same with the *antenati* of Great Britain (before our revolution) to the citizens of this country, and that the community of allegiance at the time of birth, and not the existing state of it when the descent is cast, is the principle upon which the right to inherit depends.

The latter proposition presents the weak point of their argument, for the community of allegiance at the
* 323 time of *birth and at the time of descent both existed in Calvin's Case. And if the court in their argument expressed opinions which appear to go the length contended for by the counsel, they must be considered as mere *obiter* opinions, since the decision of the cause did not depend upon them. We have no doubt that the correct doctrine of the English law is, that the right to inherit depends upon the existing state of allegiance *at the time of the descent cast.* And that the idea that it depends upon community of allegiance at the time of birth, is a consequence that follows from the doctrines that a man can never put off his allegiance, or be deprived of the benefits of it but for a crime. Community of allegiance once existing must, upon these principles, exist ever after. Hence it is that the *antenati* of America may continue to inherit in Great Britain, because we once owed allegiance to that crown. But the

same reason does not extend to the *antenati* of Great Britain, because they never owed allegiance to our government. This idea will be best elucidated in the following manner. If an action be commenced in England by an *antenatus* of America for the recovery of land, the plea of *alien born* could not be maintained, because inconsistent with the fact; nor would a plea of the severance of these states avail the defendant, because the act of his government, independent of any crime of his own, does not deprive the plaintiff of his civil rights, although it may release him from the obligation of allegiance. But if a suit of the same kind is instituted here by an *antenatus* of Great Britain, the plea of alien born could be maintained, for the plaintiff never owed allegiance to our government. To avoid it he would be put to a special replication, by which he must of necessity acknowledge the truth of the plea, and set forth circumstances which would amount to a recognition of his never having been a party in our social compact. Much of the difficulty in satisfying the mind on this subject vanishes upon a just view of the nature of the right of inheritance. Gentlemen have argued upon it as if it were a natural and perfect right; whereas it has its origin in, and is modified to, infinity by the laws of society, in exercise of the right of territorial jurisdiction. To be entitled to inherit in the state of Maryland, a right should be made out under the laws of that state. As the common law, which is the law of Maryland on this subject, *deprives an alien generally of * 32
the right of inheriting, it is incumbent upon the plaintiff to establish some exception in favour of his case. But I know of no exception, at common law, which gives the right to inherit distinctly from the obligation of allegiance, existing either in fact or in supposition of law.

Judgment affirmed.

MOUNTZ AND OTHERS *v.* HODGSON AND THOMPSON.

Quære, whether the mayor of Georgetown, in the district of Columbia, is a justice of peace of the county of Washington?

Whether a writ of error will lie to the refusal of the court below to quash an execution upon motion?

THIS was a writ of error to a supposed judgment of the circuit court of the district of Columbia, for the county of Washington, between Hodgson and Thompson, plaintiffs, and Jacob Mountz, *John Mountz* and *Henry Knowles*, defendants.

Hodgson and Thompson had recovered judgment in the court below, at December term, 1805, against Jacob Mountz and *George Reintzel*. By the act of assembly of Maryland, 1791, c. 67. entitled "An act for regulating the mode of *staying execution*, and for repealing the acts of assembly therein mentioned," it is enacted, that no execution shall issue upon any judgment, provided the *person or persons* against whom such judgment is obtained, shall come before *two justices of the peace of the county*, where such person or persons shall reside, within two months after the rendition of such judgment, and, together with two other persons, such as the said justices shall approve of, confess judgment for *his* debt and costs of suit adjudged, with stay of execution for six months thereafter; which confession shall be made in manner and form following, that is to say, "You H. M., A. B. and C. D. do confess judgment to E. F." which confession shall
* 325 be signed by the *justices before whom the same is made, and a certificate thereof shall be procured under the hands of the said justices, and such certificate shall be a sufficient *supersedeas* to the sheriff to *forbear serving execution* upon the body or goods of the *person* so obtaining such certificate. And it is further enacted, that the justices shall return the confession of judgment to the clerk of the court, where the first judgment was rendered, by the next court in course, to be entered on record; and after the expiration of the time limited in such confession, it shall be lawful to take out execution thereon, without a *scire facias* or any other delay, against either the principal or the security, or all or either of them for such judgment so confessed.

According to the provisions of this act, the original defendant *Jacob Mountz* (without his co-defendant

George Reintzel) went before John Ott and Daniel Reintzel, and, together with Henry Knowles and *John* Mountz, his sureties, confessed judgment to Hodgson and Thompson, in the form prescribed by the act of assembly. John Ott was admitted to be a justice of peace of the county of Washington, but Daniel Reintzel signed his name as *Mayor of Georgetown.*

By the act of assembly of Maryland, 1789, c. 23. incorporating the town of Georgetown, it is enacted, "That the mayor, recorder and aldermen" "shall be justices of the peace within the said town, and the precincts thereof," and that each of them "shall have the same jurisdiction *as to debts*, as any justice of the peace of any county of this state now hath, or *shall hereafter have*, by law."

After the expiration of the six months mentioned in the confession of judgment, a *ca. sa.* was issued thereon against Jacob Mountz, Henry Knowles, and John Mountz, upon which they were all taken, and on the return thereof, they moved to quash the execution;

1. Because the confession of judgment was not before two justices of peace of the *county;* and,

2. Because the judgment was not confessed by *George Reintzel*, the co-defendant in the first judgment.

But the court below overruled both objections, and refused to quash the execution; whereupon the defendants took a *bill of exceptions*, and brought their writ of error. * 326

F. S. Key, and *Morsell*, for the plaintiffs in error,

As to the first point, contended, that Daniel Reintzel was not a justice of peace of the *county*, but only of *Georgetown.* That he had only the powers necessary for the preservation of the peace in that town. And even if he had power within the town to receive a confession of judgment, it did not appear by the record that this confession was taken in the town, but might have been taken elsewhere, in which case his act would be void.

On the second point, they contended that all the defendants to the original judgment must join in the *supersedeas.* The words of the act are, "such person *or persons*," thereby implying that if there were several defendants, all must join. Suppose there should be five solvent defendants and one insolvent, who supersedes the

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judgment with two sureties; the plaintiff cannot take out execution against the five, until the expiration of the six months. If execution be stayed as to one, it is stayed as to all. The execution on a joint judgment must be against all; it must follow the nature of the judgment.

Jones, contra.

This is an *ex parte* proceeding by the debtor. *He* chooses the magistrates before whom he will confess the judgment; he is estopped to deny their jurisdiction, after he has had the benefit of the delay. But if this be an error, it is an error of *fact* which this court cannot correct. It is a question of fact, whether Daniel Reintzel be a justice of peace of the *county*. He has signed his name as *mayor*, yet he may also be a justice of peace of the county. They might as well assert that John Ott is not a justice of peace, because he has not signed his name as such. There is no such office as that of a justice of peace of Georgetown. It is to be presumed
* 327 *that the confession was made in Georgetown, as the contrary does not appear, and Mr. Reintzel signed his name in his official character as mayor of that town.

The writ of error complains of the judgment of the two justices, not of that of the circuit court. Or rather the error which they assign is an error in the judgment of the justices, and not in the judgment of the court.

The confession of judgment only stays the *service* of the execution, it does not prevent its emanation. The words of the act are, that it shall be a sufficient *supersedeas* to the *sheriff* to *forbear serving* execution. The execution may issue against all, but shall not be served upon him who has confessed judgment with sureties.

Morsell, in reply.

The judgment confessed before the justices, by being returned to the office of the clerk of the circuit court and there entered *of record*, becomes a judgment of that court; otherwise no *scire facias* could lie to revive the judgment.

The act of assembly makes the confession of the second judgment a complete *supersedeas* to the first. No execution can issue on the first judgment after confession

of the second. The words of the act are positive. "*No execution shall issue*," &c.

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MARSHALL, Ch. J. The majority of the court is of opinion that the writ of error must be quashed, this court not having jurisdiction.

The refusal of the court below to quash the execution on motion, is by some of the judges supposed not to be a judgment to which a writ of error will lie. *Others are of opinion that a writ of error will lie to that decision of the court, but that *this* writ of error is not to the judgment of the circuit court, but to that of the justices. * 328

Writ of error quashed.

BLAINE *v.* THE SHIP CHARLES CARTER, AND DONALD AND BURTON AND OTHERS, CLAIMANTS.

If the obligee of a bottomry bond suffer the ship to make several voyages, without asserting his lien, and executions are levied upon the ship by other creditors, the obligee loses his lien on the ship.

ERROR to the circuit court for the district of Virginia.

Blaine libelled the ship *Charles Carter*, *Bell*, master, owned by M'Cawley, upon two bottomry bonds; one executed in London by *Bell*, the master, on the 14th of July, 1796, and payable ten days after the arrival of the ship in Virginia; the other executed on the 27th of October, 1796, by M'Cawley the owner, in Virginia, where he resided, and payable in thirty days after the arrival of the ship in Europe. The answer of *M'Cawley* admitted the truth of all the allegations of the libel; but a claim was interposed by *Donald & Burton*, creditors of *M'Cawley*, who had, on the 30th of November, 1797, obtained judgment against him, and at whose suit the marshal, on the 30th of December, in the same year, had seized the ship in execution upon several writs of *fieri facias*, issued on the 7th of the same month, from the circuit court for the district of Virginia, before the warrant of arrest had issued from the district court, upon Blaine's libel. The

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libel was filed on the 19th of January, 1798, on which day also the warrant to arrest the ship was issued.

It appeared in evidence, that the first bottomry bond was given by the master to Blaine, upon the first voyage

* 329, *to London, and that the consideration of that bond consisted of money paid to take up a prior bottomry bond given to one Robertson, and of money paid for seamen's wages, provisions, repairs, and *finishing* the ship, she having come out from Virginia in a rough unfinished condition, and badly provided with sails and rigging. The money upon this bond was to be paid within ten days after the arrival of the ship in Virginia. She arrived in Virginia on the 28th of September, in the same year; after which the agent of Blaine called for the discharge of the bond, but on failing to receive the money, did not think it necessary to arrest the vessel. Blaine was a very large creditor of M'Cawley, over and above the amount of the bottomry bonds, and was authorized to receive the freights of the ship, and to apply them to his general account current with M'Cawley. The bond of the 27th of October, 1796, was taken in order to secure advances made by Blaine to M'Cawley to enable him to finish the ship before she sailed on her first voyage in March, 1796, to the time of her sailing, or at any time afterwards, and to secure Blaine for money paid by him to discharge three executions which had been served upon the ship. Between the date of the first bottomry bond, and the filing of the libel, the ship made two voyages from England to America, and one from America to England, and the freights were received by Blaine. The *district court* decreed in favour of Blaine for the whole amount of the first bottomry bond, and for so much of the other as appeared to have been actually advanced for necessaries for the ship; but the *circuit court*, on the 6th of December, 1799, reversed the decree, and dismissed the libel with costs. Blaine appealed from the decree of the circuit court to this court, but the appeal was at that time dismissed for want of a *statement of facts* made in the court below, agreeably to the 19th section of the judiciary act of 1789, c. 20. After the passing of the act of congress of *3d of March*, 1803, vol. 6. p. 315. c. 93. the cause was brought up again by writ of error, and was now argued upon the evidence contained in the record.

C. Lee, for the plaintiff in error.

The hypothecation in London was a legal lien upon the ship, and no circumstance had occurred to deprive the libellant of its benefit. Possession of the vessel hypothecated is never delivered to the obligee of a bottomry bond; so that no inference of fraud can be drawn from the fact, that the possession remained with the obligor; nor was there any rule of law which required the obligee to assert his lien in any given time. This lien was prior to that of the judgment creditors. *330

As to the bond of 27th October, 1797, given by the owner in Virginia, it rests upon the same law as the bond of the master. An *owner* may borrow money, on bottomry, for fitting out his ship for a voyage, and hypothecate the ship therefor. *Cro. Jac.* 209. *Sharpley* v. *Hurrell*, 2 *Bl. Com.* 458. A master, if part owner, may take up money on bottomry to the value of his own share, in places where the owners reside. 2 *Molloy*, b. 2. c. 2. s. 14. and 15. Hence it may be inferred that any other owner may do the like. If the master may hypothecate the ship, *à fortiori* may the owner. *Park*, 410. The executions of Donald and Burton were void, because issued within ten days after the judgments, contrary to the act of congress. Vol. 1. p. 63. s. 23.

P. B. Key, for the defendants in error, contended,

1. That the bonds were paid off by the receipt of the freights which ought to have been applied to that purpose.

2. That there was no bottomry consideration for the second bond; and,

3. That the bonds were fraudulently held up by Blaine, to give a false credit to M'Cawley, while Blaine was receiving the whole benefit of the vessel.

1st. With regard to the freights, he contended that, as there was no application at the time of the receipt of them, a court ought to apply them to the discharge of the bottomry bonds.

2d. That as Blaine was the correspondent of M'Cawley, and his creditor to a large amount, and the consideration of the bonds being charged *in account*, *M'Cawley* was at all events personally liable for the moneys advanced, and therefore these moneys did not run the *331

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risk of the voyage. That the bottomry bond of 27th October, 1796, was given for moneys long before advanced, and to be advanced, and not for necessaries advanced upon the credit of this security on the ship.

3d. That his suffering the vessel to go several other voyages after the bonds became due, was either evidence of fraud, or of a waiver of the lien on the vessel. It was absurd to suppose that he would risk the money a second and a third time on the vessel, without a new premium, or an insurance. It is probable that the second bond was intended to cover the vessel during her winter's stay in Virginia.

If the executions were improperly issued, the remedy was to move to quash them on their return. Perhaps they were voidable, but they were not void.

March 8.

Chase, J.(a) delivered the opinion of the court.

The libel in this case was filed upon two instruments of writing purporting to be bottomry bonds, the one executed by the master in a foreign port, the other by the owner in a port of the state of Virginia, in which state the libel was filed.

The voyage of the former bond terminated in Virginia, and the vessel has since made two voyages. The latter instrument was on a voyage which terminated in London, and the vessel has since made a voyage to this country. Upon her return here, and before the warrant of the admiralty was served, the executions were levied upon her which form the groundwork of the claim interposed by Donald and Burton.

*332 *The ship has been sold under the order of the court below, and the question is, who has the preferable claim to the money now lying in the marshal's hands. On the validity of the bond of the master there can be no question. It is acknowledged by counsel to possess all the requisites of a good bottomry bond. But it was contended that it was satisfied by the freights, which it appears Blaine was in the receipt of; and if not satisfied, was fraudulently upheld to the prejudice

(a) *Marshall*, Ch. J. having decided the case in the circuit court, did not give an opinion here. *Cushing*, J. was absent.

of general creditors. In addition to the objections taken to the first bond, it is further contended against the second, that it wanted a sufficient bottomry consideration in part or in the whole. The court think it unnecessary to give a particular consideration to the several objections above stated. A satisfactory conclusion on the rights of the parties may be drawn from other principles, on the nature and effect of the contract of bottomry.

A bottomry bond made by the master vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her which may be enforced with all the expedition and efficiency of the admiralty process. This rule is expressly laid down in the books, and will be found consistent with the principle of the civil law, upon which the contract of bottomry is held to give a claim upon the ship. In the case of a bottomry bond executed by an owner in his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom, for it is in his power to execute an express transfer or mortgage. There is strong reason to contend that this claim or privilege shall be preferred to every other for the voyage on which the bottomry is founded, except seamen's wages. But it certainly can extend no further. Had the warrant of the admiralty been first served upon the ship, there might be some ground to contend that this court ought not to devest that possession in favour of executions served at a subsequent day, at least to the prejudice of the bond executed by the master. But as the executions in this case were levied before the service of the warrant, and so long after the bonds became due, the owners of the ship had lost that possession, upon which alone the warrant of the admiralty could operate, after losing the right of preference.

*Some objections have been made to the validity of these executions, on the ground of their having issued previous to the day on which by law they ought to have issued. On this point the court will give no opinion. If irregular, the court from which they issued ought to have been moved to set them aside; they were not void, because the marshal could have justified under them, and

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if voidable, the proper means of destroying their efficacy have not been pursued.

The decree of the circuit court is affirmed, and the money ordered to be paid over to the execution creditors.

THE UNITED STATES *v.* GURNEY AND OTHERS.

B. in Philadelphia, agreed to pay to A.'s agent 170,000 guilders in Amsterdam on the 1st of March; and if he should fail so to do, then to repay to A. the value of the said guilders at the rate of exchange current in Philadelphia at the time demand of payment is made together with damages at 20 *per cent.* in the same manner as if bills of exchange had been drawn for the

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said sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment

THIS case was certified from the circuit court for the district of Pennsylvania, the judges of that court being divided in opinion upon the question, whether, upon the state of the pleadings, the judgment ought to be rendered for the plaintiffs?

It was an action brought by the United States against *Gurney and others*, upon a bond conditioned to comply with a certain written agreement between them and the secretary of the treasury of the United States, of the same date, "to pay the sum of 500,000 guilders at Amsterdam," "in the manner and form, and on or before the particular days and times in the said agreement mentioned; or in case the said sums shall not be paid as aforesaid, at either of the said places, then to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at 20 *per cent.* in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested *for non-payment, and lawful interest for any delay of payment which may take place after the demand."

After oyer of the bond and condition, the defendants set forth the written agreement, by which, in consideration of 205,000 dollars, to be immediately advanced to

which may take place after the demand. B. paid the 170,000 guilders in Amsterdam, to the agent of A. on the 13th of *May* instead of the 1st of March. A is not entitled to the 20 *per cent.* damages, but may, in a suit upon the bond given to perform the contract, recover interest on the 170,000 guilders, from the 1st of March to the 13th of May. It is not a good plea for the defendants to say that they paid the 170,000 guilders to A.'s agent, for the use of A. at Amsterdam, on the 13th of *May*, without averring it to be the whole sum then due.

them by the United States, the defendants agree to pay to the bankers of the United States at Amsterdam 500,000 guilders, in manner following, viz. 230,000 guilders on or before the first of February; 170,000 guilders on or before the first of March; and 100,000 guilders on or before the first of June, 1803; and in case the said payment shall not be made at the *times* and in the manner aforesaid, they will pay to the United States "20 *per cent.* damages for their non-compliance with this agreement, for the whole of the sum so agreed to be paid, or such parts thereof as they shall not actually pay *at the times*, place and manner aforesaid, together with interest from the day of demand of repayment on behalf of the United States," "in the same manner as for bills of exchange returned with protest for non-payment." United States v. Gurney.

The defendants then pleaded, that on the 1st of February, 1803, they paid at Amsterdam to Willink & Van Staphorst, bankers of the United States, to and for the use of the United States, the said 230,000 guilders; and on the 13th of *May* the said 170,000 guilders; and on the 16th of May the said 100,000 guilders, in the said articles of agreement mentioned; "and this they are ready to verify," &c.

To this plea the United States replied, that although the defendants, on the 1st February, 1803, paid to the said Willink & Van Staphorst, bankers of the United States, for the use of the United States, the *said* sum of 230,000 guilders, *in the said articles of agreement mentioned;* and although the defendants, on the said 13th of May, at Amsterdam, paid to the said Willink & Van Staphorst, bankers of the said United States, to and for the use of the said United States, *the sum of* 170,000 *guilders;* and although the defendants, at Amsterdam, on the said 16th of May, paid to the said Willink & Van Staphorst, bankers of the said United States, to and for the use of the said United States, *the further sum* of
*100,000 guilders, *in the said articles of agreement mentioned;* yet the said United States deny that the said last-mentioned sum of 170,000 guilders, so as aforesaid paid by the defendants to the said Willink & Van Staphorst, bankers of the United States at Amsterdam, on the said 13th of May, was, by the United States, *accepted, received and allowed in payment and satisfaction* of the said sum of 170,000 guilders, which, by the said agreement, the

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defendants were bound to pay on or before the 1st of March, 1803, *and this the said United States pray may be inquired of by the country.* And the said United States in fact say, that the defendants did not pay, or cause to be paid, to the said Willink & Van Staphorst, bankers of the United States at Amsterdam, to and for the use of the said United States, the said sum of 170,000 guilders, in the said articles of agreement mentioned, on or before the said 1st day of March, 1803, being the time prescribed by the said articles of agreement for payment of the same.

Nor have the defendants at any time since the 1st of March, 1803, paid to the United States 20 *per cent. damages* for their non-compliance with the said agreement for the payment of the said sum of 170,000 guilders, part of the said sum of 500,000 guilders in the said agreement mentioned, to the said Willink & Van Staphorst, bankers of the said United States at Amsterdam, to and for the use of the said United States, on the 1st of March, 1803, together with interest from the day of demand of repayment on behalf of the United States, in the same manner as for bills of exchange returned with protest for non-payment, *although afterwards*, viz. on the 14th of June, 1803, at Philadelphia, *demand of repayment of the said sum of* 170,000 *guilders*, together with the said 20 *per cent.* damages, was made on behalf of the said United States, by Albert Gallatin, secretary of the treasury of the United States, from the defendants, *but to pay the aforesaid sum of* 170,000 guilders, together with 20 *per cent.* damages, and interest on any part or parcel thereof, to the said United States, the defendants have hitherto refused, and still refuse, contrary to the form and effect of the said condition of the said writing obligatory, and the agreement therein referred to, and in
* 336 the plea set *forth, and this the said United States *are ready to verify*, wherefore they pray judgment, &c.

To this replication the defendants demurred specially.

1st. For duplicity.

2d. Because they could not take issue on the replication without a departure from their plea; and,

3d. Because the United States have, by their replication, endeavoured to put in issue matters foreign and irrelative to said plea.

This demurrer was joined on the part of the United States. United States v. Gurney.

E. Tilghman, for the defendants, and in support of the demurrer.

The replication is clearly double; it first denies that the 170,000 guilders, paid on the 13th of May, were received by the United States in satisfaction of the 170,000 guilders due on the 1st of March, and then, *after concluding to the country*, goes on with a new averment that the defendants did not pay the 170,000 guilders on the 1st of March; and again further avers, that the defendants did not pay the United States the 20 *per cent.* damages for failing to comply with the agreement; and again, that the defendants did not repay to the United States the 170,000 guilders, with 20 *per cent.* damages, &c.

A plaintiff cannot reply two separate matters. 5 *Bac. Abr.* 457. *Gwillim's edition.*

The replication confesses the payment, but does not avoid it.

Even if the plea were bad in form, which is not admitted, yet as payment is acknowledged by the replication at a time when no more was due than was paid, the United States cannot recover.

*If the defendant pleads a bad plea, and the plaintiff shows in his replication that he has no cause of action, the judgment must be for the defendant. 2 *Ld. Raym.* 1080. *Hob.* 128. 8 *Co.* 120. b. 133. b. * 337

If, then, we show that on the 17th of May the United States were not entitled under the contract to more than 170,000 guilders, they cannot recover in this action.

The object of the United States was to have the money paid in Amsterdam. The 20 *per cent.* was the stipulated damages for not paying the money in *that place.* By referring to the law respecting bills of exchange, the parties meant to be governed by that law; and by stipulating for *interest* in a certain event only, they are to be understood as not claiming it in any other case. By the law of Pennsylvania respecting foreign bills of exchange drawn in that state, and returned under protest, the principal sum is to be *repaid* in *Pennsylvania*, with 20 *per cent. advance* thereon. If

the principal sum cannot be claimed, the advance *thereon* cannot be claimed. It is an incident to the principal, and cannot be demanded without the principal. If a bill be protested for non-payment, but the acceptor afterwards pay it, and the holder receives the money in the place where it ought to be paid, he cannot afterwards come upon the drawer for damages, re-exchange, &c. By receiving the money he waives the objection to the time of payment. The 20 *per cent.* damages are the price of the risk, trouble and expense of transportation of the money. If the defendants have actually transported the money, and the plaintiffs have received it at the place appointed, they are not entitled to be repaid the expense of the transportation; and to charge the defendants with that expense now, would be to charge them twice.

The meaning of the agreement is, that if the United States are obliged to receive their money in *this* country, they shall receive the twenty *per cent.* advance thereon; if, therefore, they have no right to demand repayment of the money in *this country*, they have no right to the 20 *per cent.* After having received the principal sum in Amsterdam, they clearly have no right to demand payment of it here. By the non-payment
* 338 *at the *day*, the United States had only an inchoate right to the 20 *per cent.* They might have refused to receive the 170,000 guilders afterwards in Holland, and insisted on their right to repayment of the money in America. But they did not, and actually received the money in Holland, before any demand on the defendants in America. The liquidated damages can be recovered only in the case specified by the parties in their contract; and this is upon demand of payment in America, of the value of the sum *remaining* unpaid in Europe at the time of the demand. The condition of the bond is "to *re*pay to the United States the *value* of the said 500,000 guilders, at the rate of *exchange* current in *Philadelphia* at the time demand of *payment* is made, *together with* damages at the rate of 20 *per cent.*," &c. The damages could only be demanded, and were only to be paid, "*together with*" the principal. If the plaintiffs had no right to demand payment of the principal, they had no right to demand payment of the damages. By the terms of the contract, *interest*

could only be demanded from the time of demand of *re*payment on behalf of the United States, the United States having a right to demand such *re*payment.

"*Advance*" and "*interest*" are relative terms; they must refer to a *principal sum*. If there be no principal sum due, there can be no advance nor interest thereon.

The liquidated damages were the damages for the entire breach of the contract on the part of the defendants, in failing to pay altogether in Amsterdam; not for a mere delay of payment for a few days. According to the construction which the United States contend for, they would be entitled to 20 *per cent.* damages, even if they had received the 170,000 guilders on the 2d of March. Such a construction would make the contract highly penal, and therefore is to be avoided, if possible. *Doug.* 504.

In the case of Peter Blight, a bankrupt, his bills on Europe were protested for non-payment: after protest the holder received the principal money, and sent the bills back to Pennsylvania, duly protested, and with legal notice, in order to recover the 20 *per cent.* damages *out of Blight's estate. But the commissioners rejected the claim, after full argument. We consider this as a very respectable authority, as the commissioners were gentlemen of good legal and commercial information, and of sound judgment. * 339

Rodney, (Attorney-General,) contra.

The rule upon demurrers is to go back to the first fault. If our replication is bad, their plea is bad also. The defendants could only plead payment *at* or *before* the day. This is not a bond within the *statute of Anne*, the payment of which *after* the day may be pleaded. It is a bond to perform covenants.

But if payment after the day might be pleaded under the statute, yet it must be pleaded as payment of the principal sum with all interest then due thereon. 2 *Bl.* 1106. *Perkins* v. *Kenton.* 1 *Atk.* 251. *Esp. N. P.* 264. *Pleader's Assistant*, 360.

The plea does not aver that Willink & Van Staphorst were agents of the United States to receive the money *after* the day.

The demurrer admits the truth of the replication,

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which states that the United States did not receive the 170,000 guilders in satisfaction, &c.

At all events, the United States were entitled to interest on the 170,000 guilders from the 1st of March to the 13th of May.

The agreement does not require notice of non-payment, and all the forms of protest, &c. A demand is only required to entitle the United States to interest on the 20 *per cent.*

The plea is to be considered as three pleas, and therefore the United States were obliged to make three replications.

The *statute of William* allows a plaintiff to reply as many breaches as he thinks proper. 1 *Tidd's Prac.* 637. *Bull. N. P.* 163. 2 *Stra.* 994.

* 340 **Rawle*, in reply.

The question is, whether, on the whole record, the United States are entitled to recover.

The contract is, that the parties should stand in the relation of drawers and payees of a bill of exchange. The contract was made at Philadelphia, and must be governed by the laws of Pennsylvania; and under those laws the 20 *per cent.* cannot be recovered until the bill be returned. If the defendants had drawn a bill payable on the 1st of March, and it had then been protested, but afterwards, on the 13th of May, taken up by the acceptor, it could never have been returned by the payees; and, consequently, the 20 *per cent.* damages could not have been recovered.

It was not necessary for the defendants to aver in their plea that Willink & Van Staphorst had authority to receive the money; it is averred by the plea, and admitted by the replication, that the money was paid by the defendants to Willink & Van Staphorst, *bankers of the United States*, to and for the use of the United States. It is, therefore, admitted to be a payment to the United States as much as if it had been so expressed.

If no interest was due on the 13th of May, it was not necessary in the plea to aver payment of interest.

The bond is virtually for payment of a sum less than the penalty; and, therefore, within the statute which authorizes a plea of payment after the day.

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It was not necessary to plead that it was received in satisfaction. That is a fact for the consideration of the jury on the plea of payment. The demurrer does not admit the fact that it was not received in satisfaction, for the demurrer admits nothing but what is well pleaded; and to a plea of payment it is a bad replication to say that the money was not received in satisfaction. *Pleader's Assistant*, 360. *Burr.* 945. *Stra.* 691.

**March* 8. * 341

MARSHALL, Ch. J, delivered the opinion of the court as follows, viz.

This case comes on upon a special demurrer to a replication filed by the plaintiffs to a plea of payment after the day. The replication is double, and consequently ill. But it is a known rule that a demurrer brings all the pleadings before the court; in consequence of which, judgment must be rendered against him who has committed the first fault; or, which will most generally produce the same result, for him who, upon the whole record, shall appear to be entitled to their judgment. It therefore becomes necessary to examine the plea of the defendants. By their agreement with the secretary of the treasury, they were bound to pay to the bankers of the United States in Amsterdam the sum of 500,000 guilders in the following manner, viz. 230,000 guilders on or before the first day of February; 170,000 guilders on or before the first day of March; and the remaining 100,000 guilders on or before the first day of June, in the year 1803. The first payment was made on the day, and the last before the day, but the second payment was made on the thirteenth day of May, instead of the first day of March. On the effect of this payment, the whole case depends.

The defendants plead that they did, on the 13th day of May, at Amsterdam, pay to the bankers of the United States, for the use of the United States, the sum of 170,000 guilders. The replication admits this payment as pleaded, but denies that it was accepted, received and allowed by the United States in payment and satisfaction of the same sum which was payable on the first of March. The replication proceeds to aver

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that the said sum of 170,000 guilders was not paid on the first day of March, nor had the defendants paid the damages of 20 *per cent.* which were stipulated, in case of failure to pay on the day.

The fact upon these pleadings appears to be, that the payment was received by the United States without any *stipulation respecting the effect of that receipt, upon their agreement with the defendants. If payment to the bankers of the United States, the persons to whom by agreement the money was to be paid, was not payment to the United States, it would not be a payment to the use of the United States, which the plea avers, and the replication in terms admits. In such case the replication, instead of averring that this sum was not accepted in satisfaction of the same sum payable at an earlier day, would have averred, and ought to have averred, that it was not accepted at all, and was not a payment to the use of the United States, in which case, instead of a special replication, issue might have been tendered on the plea. The court, then, understands the fact as stated in the pleadings to be, that the money was received without any agreement whatever, and the law must determine the effect of such a payment.

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The payment made to the bankers in Amsterdam being, then, an actual payment to the United States, the inquiry is, whether it was such a payment, and is so pleaded, as to bar this action.

It is admitted that the *statute of Anne*, which allows payment after the day to be pleaded, is in force in Pennsylvania, but it is contended that this bond is not within that statute; or, if it is, that this plea is not good under it.

If this be a bond within the *statute of Anne*, on which the court gives no opinion, yet by that statute, the payment must be of the whole sum actually due, or the action for the penalty is not barred.

In this case the sum due on the first of March was paid on the 13th of May, without interest or damages.

By the United States it is contended, that damages at the rate of 20 *per centum* on the sum of 170,000 guilders were then due; by the defendants it is contended that no interest was due.

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*The words of the contract to which each party refers, are not precisely the same in the condition of the

bond and in the articles of agreement which are referred to by the bond. There is no contradiction between them; but there is a variance in this, that the condition of the bond expresses more fully than the articles the idea of the parties, that in case of failure to perform the contract at Amsterdam, the demand for payment was to be made in Philadelphia. The words of the condition are, "or in case the said sums shall not be paid as aforesaid, then to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 *per cent.* in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment that may take place after the demand."

The defendants were merchants residing and carrying on trade in Philadelphia, in which place the contract was made, and by the law of the state, bills of exchange returned unpaid under protest are liable to 20 *per cent.* damages. It is sufficiently obvious, from these circumstances, and from the words of the condition, that the parties contemplated a repayment in Philadelphia in the event of non-payment in Amsterdam.

It is contended by the plaintiffs that, the instant the failure to pay the 170,000 guilders on the first of March had taken place, a full and complete right to the stipulated damages was vested in the United States, without any further act on their part; and that a payment of the principal sum on the succeeding day would not have relieved the defendants from those damages.

In this opinion the court does not concur with the counsel for the United States.

Contracts are always to be construed with a view to the real intention of the parties. In this contract, the object of the United States was to remit to their bankers in Amsterdam a sum of money, for which they had *occasion in Europe. The heavy damages to be incurred by the defendants in the event of their failing to make their stipulated payments in Amsterdam, were considered as a compensation for the disappointments produced by the non-payment of the money at that place in such time as to answer the purposes of the

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contract. Whether payment at the same place on a subsequent day would answer these purposes, was for the United States to determine. They might accept it, or they might reject it, and claim whatever the law of their contract would give them. In the event of non-payment in Amsterdam at the time stipulated, the defendants are to repay to the United States the value of the guilders they shall have failed to pay in Amsterdam, "at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 *per cent.*" The fair interpretation of this agreement is, that the demand is to be made in Philadelphia, that the money is to be repaid in Philadelphia, and that the damages are upon the money there to be repaid. Had a part of the sum of 170,000 guilders been paid on the first of March, it will scarcely be contended that damages would have accrued on that part. A repayment of it could not have been demandable in Philadelphia. It appears to the court that the acceptance of any part of the sum due in Amsterdam on a subsequent day, is a waiver of the claim to damages, in Philadelphia, on the sum so accepted, for that sum cannot be demanded in Philadelphia.

This reasoning, to which the majority of the court would strongly incline, from the nature and circumstances of the contract, derives much additional force from the reference to bills of exchange. The repayment of the value of the guilders "at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 *per cent.*" is to be made "in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment."

Why is this reference made to bills of exchange?

* 345 *The stipulation that damages at the rate of 20 *per centum* should be incurred on those sums which the defendants might fail to pay at the time and place mentioned in their contract, did not require it unless the law of bills of exchange was either to explain or to give validity to that stipulation. To a majority of the court it is satisfactory evidence that the parties intended this contract, if not as a complete substitute for bills of exchange, to operate between themselves as if bills had been drawn.

The law of Pennsylvania regulating bills of exchange was well understood. If those drawn on any part of Europe are returned back unpaid with a legal protest, the drawers and endorsors are subjected to damages at the rate of 20 *per centum*. But the right to these damages is not complete until the bill be returned back under protest. Till then they are not demandable. Consequently, payment before the bill returns does away the right to demand them. By receiving payment, the holder waives his right to damages. The express reference to bills which is made in this contract, and the terms in which that reference is made, being considered by the majority of the court as explanatory of the intention of the parties that the right to damages should be put on the same footing as if bills had been drawn, form an additional reason for their opinion that an acceptance in Amsterdam after the day, before a demand in Philadelphia, amounts to a waiver of any right the United States might otherwise, perhaps, have had to demand the stipulated damages.

But whether the sum agreed to be paid as a compensation for a failure to pay at the time and place mentioned in the contract, be considered merely as a penalty, or as stipulated damages, of which the law will coerce the payment, a forfeiture took place on the non-performance of the condition of the bond, and a right to something more than that condition vested immediately in the obligees. If the reservation of damages in the condition of the bond is in law only a double penalty, then interest is the legal compensation for this breach of the covenant contained in the condition of the bond. If it be even of the character given to it by both parties in argument, the amount of damages settled by the parties themselves, the majority of the court *is not satisfied, that in waiving those damages the obligee has, without any agreement on the subject, relinquished that right to interest which is attached to all contracts for the payment of money, which is only displaced by the agreement to receive a larger sum in damages, and which a mere tacit implied waiver of those stipulated damages might reinstate. The majority of the court, therefore, is of opinion, that under the circumstances which have taken place, the United States ought to receive, under this contract, interest on

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the sum of 170,000 guilders, from the first of March, the day on which that sum ought to have been paid, until the thirteenth of May, the day on which it was actually paid. Judgment, therefore, on the pleadings, must be rendered for the plaintiffs.

By the 26th section of the judicial act, it is directed, that in cases of this description the court shall render "judgment for so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury."

In this case it is the opinion of the majority of the court, that judgment ought to be rendered for so much as remains due of the sum of 170,000 guilders, calculating interest thereon from the first of March in the year 1803, and if either of the parties request it, that a jury be empannelled to ascertain the value of this sum in the money of the United States.

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*PEISCH AND OTHERS *v.* WARE AND OTHERS, AND THE UNITED STATES *v.* THE CARGO OF THE SHIP FAVOURITE.

Wine and spirits saved from a wreck and landed, are not liable to forfeiture because unaccompanied with such marks and certificates as are required by law; nor because they were removed without the consent of the collector, before the quantity and quality were ascertained, and the duties paid.

THESE cases were appeals from the circuit court for the district of Delaware. *Peisch* and others, owners of the ship *Favourite* and her cargo, libelled *Ware* and others in the district court, for the possession of certain goods, part of that cargo, which the latter had saved from the ship, which had been wrecked in the Delaware Bay.

The cargo consisted principally of wine, brandy, cordials, olive oil, and silks.

On the night of the 26th of October, 1804, the ship Favourite, being at anchor in the Delaware Bay, parted both cables, and was driven on to a shoal. The crew cut away all the masts; in the morning she had drifted over the shoal, but the crew not being able to keep her clear

The award of arbitrators appointed under a mutual mistake of both parties in supposing themselves bound by law to submit the matter in dispute to arbitration, is not obligatory.

The owner of goods cannot forfeit them by an act done without his consent or connivance, or that of some person employed or trusted by him.

One half allowed for salvage in the Delaware bay.

Quære, whether goods saved are liable for duties.

with the pumps, and having eleven and a half feet of water in the hold, they quitted the ship, about 9 o'clock, A. M. and went to Cape May for assistance. On the same morning, about 10 o'clock, the ship was seen from the town of Lewis, a small town on the shore of the state of Delaware, but not a port of entry, by Thomas Rodney, an inspector and surveyor of the revenue who resided at that place. The ship was then drifting out to sea, without masts, anchors, cables, or rudder. He collected a number of men and boats, and went on board the ship, and having towed her on to a shoal called the Shears, they began to discharge the cargo into the boats. Rodney supposing himself authorized by the *wreck law*, as it is called, of the state of Delaware, to take the lead in the business of salvage, *appointed Ware to superintend the delivery of the cargo from the ship, and went on shore himself, to attend to the landing and storage of the goods saved. * 348

On the 29th of October, the mate with three of the crew returned to the ship in a shallop they had procured at Cape May, with intent, as they said, to save what they could of the cargo. They found the ship in possession of Ware and others, who would not suffer the mate to take any thing out of the ship, except his clothes and those of the crew. The mate then left the ship. There were 48 hands and six boats employed 16 days and 12 nights in saving the goods; besides four flats and seven or eight hands hired occasionally to work in the flats.

On the 7th of November Peisch arrived, and on the 9th offered to pay 4,000 dollars for salvage, which the salvors refused, the goods saved being supposed to be worth about 14,000 dollars, and demanded one half for salvage. Not being able to agree, the parties supposing themselves bound by the law of Delaware, which requires an arbitration in such cases, referred the rate of salvage to three men, who awarded one half to the salvors. On the 18th of November, the collector of the district of Delaware arrived at Lewis, and on the 19th the salvors offered themselves ready to secure the duties upon their half of the goods saved, and requested that the amount of duties might be ascertained at Lewis. This the collector refused, and ordered the goods to be sent to Wilmington, a port of entry, to have the duties

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ascertained; and Rodney delivered them into his possession. The salvors then sued out a writ of replevin from the state court of Delaware, and took the possession of the goods from the collector, who thereupon seized them as forfeited to the United States for breach of the revenue laws.

The first count of the libel filed by the United States claimed the wine, brandy and cordials, as being forfeited, because they were unaccompanied with such marks and certificates as are required by law, the duties not having been paid or secured.

* 349 *The second count claims them as forfeited, because they were removed without the consent of the collector, before the quantity and quality of the wines and spirits, and the duties thereon, were ascertained according to law; the duties not having been paid or secured.

The third count claims all the goods forfeited, because they were found concealed, the duties not having been paid or secured.

On this libel by the United States, the district court decreed that the goods were not liable to forfeiture, but were subject to the terms of the decree of the court in the suit respecting salvage, by *Peisch and others against Ware and others;* which decree was affirmed in the circuit court, and the United States appealed to this court.

Reed, United States attorney for the district of Delaware, contended,

1. That the libellants were entitled to damages against the salvors to the whole amount of the goods saved, because, by the improper acts of the salvors, they have been forfeited to the United States, and so wholly lost to the libellants.

2. That the salvage allowed, if any is due, was too high.

1. The goods are forfeited to the United States, first, under the 43d section of the act of congress regulating the collection of duties on imports and tonnage, vol. 4. p. 350. because found without marks and certificates; second, under the 51st section of the same act, because removed before the proof, quality and quantity thereof were ascertained, and the duties paid or secured; and, thirdly, under the 68th section of the same law, because

they were concealed, the duties not having been paid or secured.

The removal of the wines and spirits without marks and certificates, is clearly within the letter of the law. The power to remit or mitigate the forfeiture, can only be exercised by the secretary of the treasury.

*It is not necessary that Peisch and others should have been privy to the removal. It is wholly unimportant who removes the goods. The United States look only to the thing itself. The proceeding is *in rem*. If the unlawful act be done even by a stranger, the goods are forfeited. The revenue laws are to be construed strictly according to their *letter*. 4 *Dall.* 28. *Priestman* v. *United States*. * 350

There is no difference between a careless and a fraudulent omission of duty. *Peters's Rep.* 448.

The offer to pay the duties was illusory; the collector could not receive them.

Salvage goods are liable to duties, if intended for importation into this country. The case of *Shepherd* v. *Gosnold*, *Vaughan*, 166. was of *wreck on shore*, not of floating wreck; and the goods saved were not intended for importation. 6 *Bac. Abr.* 280, 281. (*Gwill. ed.*) 1 *Peters*, 45. 47. 62. In the case of *The Blaireau*, in this court, (*ante*, vol. 2. p. 240.) there was no question as to the duties; the goods were not intended for importation.(*a*)

If, then, the goods are forfeited to the United States by the unlawful acts of the salvors, the court below ought to have decreed restitution in value, and given damages to the libellants. 3 *Rob.* 108. *The Der Mohr*. Their libel, although it avers an offer to pay salvage, does not preclude them from averring that no salvage is due, nor from claiming damages. The libel contains a prayer for general relief, and the court will pass such a decree as their case, upon proof, deserves, without regard to the specific relief prayed. 3 *Dall.* 86. 333. 3 *Rob.* 108. (*American ed.*)

(*a*) JOHNSON, J. Do the opposite counsel seriously contend this point?

Van Dyke, for the appellees. We do not think the question important to this case, but we have strong authorities in support of our side of it.

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*But even if the goods are not liable to forfeiture for the improper conduct of the salvors, yet *they* are not entitled to salvage. By the 52d section of the act before recited, (vol. 4. p. 362.) it is made the duty of the collector, in case of an incomplete entry, to cause the goods to be stored. An incomplete entry of these goods was made, and the revenue officer, Rodney, did no more than his duty in securing the goods. The other persons acted only as his servants or agents. He was paid his daily allowance for his trouble, by the collector. The appellees never had such possession of the goods as entitled them to retain them for salvage. The possession was in the United States, who held a prior lien on them for the duties. Rodney first took possession of them as an officer of the revenue, and held them for the United States, not for the salvors. *They* never had a rightful possession. The only possession they ever had was under void writs of replevin from the state court, which had no jurisdiction.

The possession upon which the writs of replevin were founded, was at most a possession under a lien for salvage, which is a matter exclusively of admiralty jurisdiction. The writs of replevin being void, they were *trespassers* in taking possession under them. A tortious act cannot be the foundation of right. They forfeited all right to salvage by resisting the mate and crew; and by the embezzlement of part of the goods saved.

The award does not preclude the libellants from averring that no salvage is due. The arbitration was entered into by mistake. It was supposed by Peisch that he was bound to enter into the reference, by the 7th section of the act of assembly of Delaware, of February 2, 1786. (*Delaware Laws*, vol. 2. p. 831.) But that law was repealed by the constitution of the United States, which transfers all the admiralty jurisdiction to the courts of the United States exclusively; and by the act of congress, (*the judiciary act of* 1789,) which provides for the exclusive exercise of that jurisdiction by the *district* courts.

* 352 *Since this act of congress, the *state* officers have had no right to meddle with property within the admiralty jurisdiction. The question of salvage is exclusively of

admiralty jurisdiction, and belongs to the district court; and every provision of the act of assembly of Delaware upon that subject is entirely repealed. Peisch's assent, therefore, to the arbitration, being founded in a mistake of his rights, was a void act; and the award can derive no validity from his assent. If it derives no validity from his assent it is a mere nullity, for it is the judgment of an incompetent tribunal. The arbitrators could derive no authority from the law of Delaware.

A court which has exclusive jurisdiction of the principal subject, has also jurisdiction of the incidents. The common law courts of the state had no jurisdiction in any shape whatever. 1 *Peters*, 93. *Brevoor* v. *Ship Fair American*. 3 *T. R.* 343. *Smart* v. *Wolfe*.

But even if the act of assembly were in force, the award is not made in conformity with its provisions.

In the *first* place, no authority can be exercised under that law but by a sheriff, or a justice of peace, or an officer of the customs, and then, only, upon application by the master or owner of the ship. But here, so far from being requested by any person interested in the ship, the salvors drove away the mate and the crew; and, *secondly*, the persons claiming salvage under that law must have been *summoned as salvors*.

The salvors have resorted to an incompetent tribunal; they ought to have libelled in the district court, which has exclusive cognisance of the case.

2. But if any salvage was due, the amount decreed is exorbitant. The amount offered was a very liberal compensation for their time, risk and labour. There was *no* danger. The vessel was all the time within the bay; and they had pilot boats constantly alongside. The cargo was in its nature so bouyant, that the ship could not sink.

*In the *case in* 19 *Viner*, 275. only one tenth was given for salvage on the coast. In *The Blaireau* (*ante*, vol. 2. p. 240.) only one third was given; and that was a case of great risk and merit. 1 *Peters*, 10. 37. *Molloy*, b. 5. c. 10. * 353

Broom and *Van Dyke*, contra.

There are only two questions in this case.

1. Whether the goods are forfeited to the United States; and,

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2. Whether the salvage allowed is too high?

1. The inspector had no authority to unlade the ship. No entry had been made, and no permit granted. He could only unlade in the character of a salvor. When the goods were landed, he had a right to direct where they should be deposited until the duties were ascertained, and paid or secured, but his right extended no further. The lien of the salvors was not inconsistent with that of the United States. As to every thing beyond the security of the revenue, the officer was a trustee for the salvors and the owners. He held as much for them as he did for the United States, until he undertook to hold *adversely*.

The state courts had a right to issue the writs of replevin. Replevin, in Delaware, is a substitute for *trover*. It is the writ by which they try the question of property; and trover will certainly lie against a revenue officer for an illegal seizure. *Esp. N. P.* 583. 3 *Rob.* 178. 4 *Rob.* 160. 188. *Burr.* 2657.

It is not denied that salvage is a question of admiralty jurisdiction, and that the court of admiralty has also cognisance of incidents; but not exclusive cognisance. It was never so contended in England. The court of admiralty had a hard struggle to get even a *concurrent* cognisance of incidental questions.

Salvage goods are not liable to duties, nor, if they are, can the goods be forfeited by any act of the salvors.

* 354 *Such was never the intent of the act of congress. All statutes must have a reasonable construction. *Vin.* tit. *Statute*, 519. 1 *Bl. Com.* 91.

By the revenue laws, goods are liable to forfeiture by landing at any other than a port of delivery, or without permit, or in the night, yet it will not be contended that these provisions apply to goods wrecked and driven on shore. But they are certainly within the *letter* of the act.

In *Courtney* v. *Bower*, cited in 1 *Lord Raym.* 388. and 501. it is not stated that the goods were intended to be imported, and such is not the ground of decision in *Shepherd* v. *Gosnold*, *Vaugh.* 159. But the true ground of decision is, that the goods *were* not *imported as merchandise*, but were driven in by stress of weather; that it was not a voluntary importation. 6 *Gwillim's Bac. Abr.* 280. Although the words of the Bri-

tish navigation act, 12 *Car.* II. c. 18. are, "*imported as merchandise*," yet those statutes which use only the word "*imported*," have received the same construction. *Reeve's Law of Shipping*, 203. 2 *Wils.* 257.

The act of congress means a voluntary importation. It is in many respects similar to the British statute.

There is no importation until bulk is broken. Until then there is no forfeiture of the goods, although the vessel depart with them. There is only a penalty of 400 dollars on the master. *Collection Law*, s. 29. 31, 32, 33. 36. 45. *Hallet & Bowne* v. *Jenks*, (*ante*, vol. 3. p. 219.) The *statute of 5 Geo.* I. makes stranded goods liable to duty; hence it may be inferred that they would not have been so liable but for the statute. *Bac. Abr.* tit. *Smuggling*, 274. *Hard.* 360. *Hargrave's Law Tracts*, 215, 225. *Reeve*, 24. 66. 85. 207, 208. 212. &c. 1 *Plowd.* 1. *Reneger* v. *Fagossa*. *Cro. Eliz.* 538. *Coll. Jurid.* 72. 75. 79. *Reeve*, 200. *Loft*, 200. 1 *Hawk.* c. 17. s. 83. *Raym.* 377. The king has no remedy for his subsidy, unless the goods be landed.

There must be fraud or negligence. No act of the salvors forfeited the goods. If they are trespassers, as is contended, no act of theirs could forfeit them. It must be an act done by the owners, or with their privity, or by some person acting under their authority. * 355

In the case of *The Blaireau*, *Judge Winchester* decided that salvage goods were not liable to duties; and the decision on that point was not questioned on the appeal.(*a*)

(*a*) The counsel for the appellees were permitted in this court to read the following letter from *Judge Winchester* to *Judge Bedford*, stating the grounds of that decision.

Shaware, Baltimore County, March 9, 1808.

Dear Sir,

It seems that the full statement of the arguments and opinion made by me in the case of duties on wreck and salvage goods, has been lost or mislaid. I can, therefore, only furnish you with the state of the case, the points and authorities.

The ship La Blaireau, on a voyage from the *West Indies to France*, and wholly owned by foreign subjects, was run down at night by a Spanish ship of war, and abandoned by the crew, who were taken off by the Spanish vessel. The next morning The Blaireau was discovered by the British ship Firm, taken up as a wreck, and salvage; and conducted to the port of Baltimore.

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*Misconduct is charged against the salvors, because they prevented the mate and three of the crew from taking away part of the cargo.

The cargo was very valuable, containing sugars, coffee, liquors, lace, and diamonds. The two latter articles were in very small boxes, and the facility of their concealment had tempted the British captain to *conceal* some of the boxes; but the fact was discovered, in consequence of a quarrel between him and another person, relative to a division of the booty.

An action was instituted against the captain for the penalty imposed by the revenue law, on *concealing* these articles of lace and jewelry, upon the ground that they were chargeable with duties.

Mr. Martin argued for the defendant, that the case was not within any statute; that it was not an *importation*, within the revenue laws, which go only to ordinary cases of trade, with the exception of the single case of distress, provided for by the 60th section of the act. He commented on the 23d, 29th, 30th, 60th, 68th, and 69th sections, to show that the whole of the provisions of the law applied only to voluntary importations; that they did not apply to salvage goods, which could not be accompanied by the manifests, bills of lading, &c. required in ordinary cases; nor could the oaths imposed by law be taken in the case of salvage. He then argued that no misconduct whatever of the salvors can create a *forfeiture* of goods of which they *had taken possession as salvors*, and referred to 6 *Bac. Abr.* 280. (*Gwill. edit.*) on the general question, relying on the cases there cited, and 1 *Ld. Raym.* 388. 501. *Reeve's Law of Shipping*, 201. *Bunbury*, 236. *Stat.* 5 *Geo.* I. c. 11. s. 13. 26 *Geo.* II. c. 19. s. 5.

The district attorney argued that the importation meant a *bringing in*. That the privity of owners was not necessary. *Seamen* forfeit the ship by running the goods, and by the 111th section of the revenue law, which provides for an entry where particulars are unknown, salvage goods might be entered.

The court decided that salvage goods were not dutiable; and referred to the following authorities, in addition to those mentioned at the bar. The case of *Dyson* v. *Lord Villars*, (a very strong case,) *Collect. Juridica*, 79, 80. *Strange*, 943. *Hardres*, 362. *Parker*, 212. *Cro. Eliz.* 534. The court relied on the 61st and the 62d sections of the revenue law, to show that the duties were not due on importation, and to bring the case within Sir J. Marriot's opinion, *Collect. Juridica*, 88. Two decisions of Judge Paca were also referred to by the court; one of which decided that prize goods were not operated upon by the ordinary revenue laws; and that brandy (brought) in as *prize* by a French privateer, (before the prohibition to sell their prize goods in our ports,) though in vessels of less capacity than allowed in the ordinary course of trade, were not forfeitable. The other, under the statute of the United States which prohibited the *exportation of arms, &c.* Judge Paca held, that the exportation of arms, &c. constituting the equipment of the vessel, was not an exportation within the statute.

The court (in the case of The Blaireau) intimated a strong opinion that *importation* implied a bringing in *voluntarily*; and referred to the decisions under the non-intercourse law with France, where it was holden that *commercing* after an involuntary going into French dominions, was not a *commercing* prohibited by law, and also relied

*But the salvors had a right so to do. They were in possession and had saved a considerable part of the cargo, and were in the act of saving the residue; they had a lien upon the whole for salvage. There is no evidence of any embezzlement by the salvors; that charge is not supported. Nor is there the least evidence that any part of the goods were concealed to evade payment of the duties.

2. The award is conclusive as to the rate of salvage. It is immaterial whether the law of Delaware be in force or not. But Delaware is a sovereign independent state, and has all the rights of sovereignty not given up to the United States by the constitution. The United States admiralty court is bound by the laws of Delaware, so far as they are consistent with those of the United States. The *jurisdiction* is given to the courts of the United States by the constitution and laws of the United States, but the state laws are *rules of decision* in those courts, in cases where they apply.

It is said the award was not made agreeably to the act, and that the parties were not bound to submit to the arbitration.

That act is like that which gives power to the commissioners of the *cinque ports* to decide the question of salvage; and if the parties submit to the jurisdiction, it is fit they should abide by the award; although the arbitrators had no jurisdiction otherwise than by consent. 3 *Rob.* 261. *The American Hero.*

The libellants objected to the amount, not to the jurisdiction. Whether it be an award under the act of Delaware, or by consent of parties, it is equally binding; and the court cannot look into the reasonableness of it.

As to the amount of salvage, the counsel cited 1 *Rob.* 263. 3 *Rob.* 286. and 5 *Rob.* 289. *The Jonge Bastiaan*,

strongly on *O'Callion's Case*, 1 *Hawkins*, c. 17. s. 83. upon the statute 27 *Eliz.* c. 2.

The above contains the substance of the arguments and opinions, and all the authorities referred to in the case of The Blaireau. It will afford me pleasure if you shall be able to derive any assistance from them.

I am very respectfully,
Your obedient servant,
J. WINCHESTER.

Hon. Judge Bedford.

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where two thirds were given for salvage, in a case of *derelict*.

* 358 **Rodney*, (Attorney-General,) in reply.

There was not much risk to the owners of the cargo; it was not in great danger; and there was no danger in saving the goods. The salvors, at most, can only claim a compensation for their time and labour. But they are not entitled to any thing. They resisted the officer of the ship, when, by the very law of Delaware, under which they pretend to have acted, they ought to have obeyed his orders.

The goods were subject to duty, and forfeiture. There is no reason why goods having paid salvage should not be liable to duties. The decision of *Judge Winchester*, in the case of *The Blaireau*, is not admitted to be law. Even wearing apparel would be liable, but for the exception in the act. The exception proves the general rule.

The British statute differs in its language from ours, and, therefore, the English authorities do not apply.

The misfortune only exempts the owners from the *penalties* of the act, but does not exempt the goods from forfeiture.

March 9.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

In these cases two questions are to be decided by the court.

1st. Is the cargo of the Favourite, or any part of it, forfeited to the United States?

2d. Are Ware and others entitled to any, and if to any, to what salvage.

The first count in the first libel filed on the part of the United States claims the brandies, wines and cordials therein mentioned, in consequence of their being found in the possession of certain persons therein named,

* 359 unaccompanied *with such marks and certificates as are required by law, the duties thereon not having been paid, or secured to be paid.

The second count claims them as forfeited because they were removed, without the consent of the collect-

or, before the quantity and quality of the said wines and spirits, and the duties thereon, were ascertained according to law; the duties thereon not having been paid or secured.

The third count claims them because they were found concealed, the duties not having been paid or secured according to law.

The second libel claims certain other goods, which were parcel of the cargo of the Favourite, as forfeited, by being found unlawfully concealed, the duties thereon not having been paid or secured.

The facts of the case are these: The ship Favourite, belonging to Mr. Peisch, of Philadelphia, was discovered, about the last of October, adrift in the bay of Delaware, with her masts gone by the board, and without anchors, cables or rudder, and in danger of being carried out to sea. A company was formed to save the vessel and cargo; and with considerable labour, in the course of several days, the cargo was unladen and landed at *Lewis*, a small town on the bay, not a port of delivery, where it was, with the approbation of the collector, left under the care and in the custody of a revenue officer residing at that place, who was one of the party that had originally taken possession of the vessel, and under whose direction the whole business had been in a great measure conducted. On the 3d of November, while the salvors were unlading the vessel and landing the cargo, an imperfect entry was made by the owners or consignees, after which an award was made between the owners and salvors, by which the salvors were allowed one half the cargo. The owners were dissatisfied with this award, and refused to acquiesce under it. The collector ordered the goods, which had been in the custody of a revenue officer, to be carried to Wilmington for the purpose of *ascertaining the amount * 360
of duties. The salvors objected to this, and requested that the duties might be ascertained at *Lewis*, offering at the same time to pay the duties on the moiety of the cargo claimed by them under the award. The collector persisting in his determination to remove the goods to Wilmington, the salvors sued out a writ of replevin from the state court, and by force of that writ took the goods out of the possession of the revenue officer. This act is the foundation of the forfeiture alleged in the libels.

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The forfeiture said to be occasioned by the goods being found without the marks and certificates required by law, depends upon the 43d section of the act for collecting duties, and on other sections of the same act, which are explanatory of the 43d section. The particular clause giving the forfeiture is in these words: "And if any casks, chests, vessels or cases, containing distilled spirits, wines, or teas, which *by the foregoing provisions* ought to be marked and accompanied with certificates, shall be found in possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same are liable to forfeiture." The law then authorizes a seizure, and subjects such distilled spirits, &c. to forfeiture, unless it be proved at the trial that they were imported according to law, and that the duties were paid or secured.

The objects of this clause are those vessels only which, "*by the foregoing provisions*," ought to be marked and accompanied with certificates. To determine its extent, the "*foregoing provisions*" must be looked into.

This subject is first taken up in the 37th section of the act. That section directs particular and additional entries to be made of distilled spirits, wines and teas, which provisions are adapted to regular importation, not to those articles when saved from a wreck.

The entry is to be made by the importer or consignee, and specifications are required which can only be given by the owner or consignee, when in possession of the papers relative to the vessel and cargo. If a vessel be
* 361 *wrecked on the coast, the cargo must be lost, or brought on shore without the knowledge of the owner or consignee, so as to put it in his power to make the entry, and the salvors are not only not the persons designated by the law to make, but they will often not possess the information which would enable them to make it.

The act proceeds to require that this entry shall be transmitted to the surveyor of the port where the delivery of the cargo is to commence, to whom also every permit for unlading or landing any part of the cargo must be previously produced, who shall record the same, and endorse thereon the word "inspected," the time when, and his own name. Goods landed previous to these formalities are to be forfeited.

These regulations obviously respect a regular importation, where all these prerequisites to landing may be performed; not cases where a landing must take place without them. To suppose them applicable to salvage goods, would be to suppose that the legislature designed to prohibit salvage entirely, or to forfeit the cargoes of all vessels which might be wrecked on the coast.

The 38th section requires that all distilled spirits, wines and teas, shall be landed under the inspection of the surveyor, or other officer acting as inspector of the revenue for the port, and, therefore, can relate only to cases of regular importation at the port of delivery, where the revenue officer may superintend the landing. He is directed to attend at all reasonable *times*, not at all *places*.

The 39th section prescribes the duty of the officer of inspection of the port where the spirits, &c. may be landed. He is to ascertain the duties, and mark the casks.

The 40th section directs the surveyor, or chief officer of inspection of the port or district in which the *said* spirits, wines or teas shall be landed, to give the proprietor, importer or consignee a general certificate; and the 41st section directs him to give a particular certificate *for each vessel, which certificate passes with the vessel to the purchaser. *362

These sections are connected with those which precede them, and relate to regular importations, where the spirits, &c. are landed under a permit at a port of delivery, and there is a proprietor, importer or consignee, or an agent to whom the certificates may be granted; not to spirits, &c. which may, from the nature of things, lawfully get into the possession of individuals without the knowledge of a revenue officer.

The 42d section only directs that blank certificates shall be provided.

These are the sections which precede that which is supposed to give the forfeiture claimed under this count of the libel.

The first part of the 43d section directs the proprietor, importer or consignee, who may receive the said certificates, to deliver them with the vessels to the purchaser; and then comes the clause which subjects to forfeiture all vessels containing spirits, &c. which may be found un-

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marked and not accompanied by certificates, which by the *foregoing provisions* ought to be marked and accompanied by certificates.

In the *foregoing provisions* the legislature, in the opinion of this court, did not intend to comprehend wrecked goods, or goods found under circumstances like those in the *Favourite*, where the vessel was deserted by her crew, and where it might be necessary, for the preservation of the goods, to take them to the nearest accessible part of the coast. Either these spirits and wines would have been liable to forfeiture if brought to land under the most pressing circumstances, where inevitable loss must attend any delay, if a revenue officer should not be present to take possession of them, or the single circumstance of their being found unmarked and unaccompanied with certificates, is not in itself sufficient to forfeit them. The opinion of the court that it was not the intention of the legislature to subject goods, under such circumstances, to

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forfeiture, is not formed exclusively *on the extreme severity of such a regulation. It is formed also on what is deemed a fair construction of the language of the several sections of the law, which seems not adapted to cases like the present.

The second count in the libel claims the goods as forfeited, because they were, without the consent of the proper officer, removed from the place where they were deposited, before the amount of duties was ascertained, the duties at that time not being paid or secured.

Neither this count, nor the first, supposes any forfeiture to have been incurred by the landing of the goods, or the unlading of the vessel. The spirits and wines are presumed to have been legally brought on shore, and it is the removal only which gives title to the United States. The court, therefore, is to inquire, whether these goods were under such circumstances that a removal, such as has taken place in this case, will produce a forfeiture. This depends on the 51st section of the law, in expounding which it becomes proper to notice the 50th also. This section prohibits the unlading of any vessel, or the landing of any goods, without a permit granted by the proper officers, and subjects the master or other person having the command of such vessel, and all those who shall be concerned in unlading, removing, or storing such

goods, to heavy penalties, and the goods themselves to forfeiture.

It was well observed that the application of this section to cases where the goods must perish, if not immediately brought on shore, and to cases in which a permit cannot regularly be granted, would be not only to prohibit, but to punish every attempt to save a cargo about to be lost on the coast. This construction of the law could only be made where the words would admit of no other. But it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed. The means prescribed to save the forfeiture given in the 50th section cannot be employed where a vessel is deserted by her crew, or cannot be brought into port. The permit cannot be obtained, nor can those steps which must precede the attainment *of a permit be taken. Upon just legal construction, then, the landing of these goods without a permit did not subject them to the forfeiture of the 50th section. This act is not within the law. The 50th section is calculated for cases in which the general requisites of the law can be complied with, not for salvage goods, in cases where those general requisites cannot be complied with.

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The 51st section relates to the removal of goods from the wharf or place on which they may have been landed in conformity with the directions of the 50th section. It presupposes a permit, and that they were landed under the inspection of a revenue officer, in the manner prescribed by the 38th section.

It presupposes a case in which the guaging and marking may be done, and the other means prescribed for the ascertainment of the duties and security of the revenue may be taken, at the place of landing; not a case in which a landing must be made without a permit, often in the absence of a revenue officer, and where the goods could not be permitted, without extreme peril, to remain at the place of landing until these measures should be taken.

The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him.

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If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property. In the 52d section, therefore, to which the revenue officers seem to have intended to conform, so far as the case would admit, which directs them in the case of an incomplete entry to store the goods at the risk and expense of the owner or consignee, no forfeiture is annexed to their removal, unless the penalties of the 51st section, or of the 43d section, be applied to the 52d.

The court is of opinion that those penalties cannot be so applied in this case, not only because, from the whole
* 365 *tenor of the law, its provisions appear not to be adapted to goods saved from a vessel under the circumstances in which the *Favourite* was found, but because, also, the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control.

It has been urged on the part of the United States, that although the property of the owner should not be forfeited, yet that moiety which is claimed by the salvors has justly incurred the penalties of the law. But if the award rendered in this case be not binding, the salvors could have only a general claim for salvage, such as a court might allow; and if it be binding, still they acquired no title to any specific property. Their claim was in the nature of a general lien, and any irregular proceeding on their part would rather furnish motives for diminishing their salvage, if that be not absolutely fixed by the award, than ground of forfeiture. The irregularity, too, if any, which has been committed by them, being merely an attempt to assert, in a course of law, a title they supposed themselves to possess, and with no view to defraud the revenue, this court would not be inclined to put a strained construction on the act of congress, in order to create a forfeiture.

The third count in the first libel, and the second libel, claim a forfeiture on the allegation that the goods were concealed. The fact does not support this allegation. There was no concealment in the case.

Taking all the circumstances into consideration, it is the unanimous opinion of the court, that no forfeiture has been incurred, and that the libels filed on the part of the United States were properly dismissed.

The next question to be considered is, to what amount of salvage are the salvors entitled? That their claim is good for something, is the opinion of all the judges; but on the amount to be allowed the same unanimity does not prevail.

*For the *quantum* of salvage to be allowed, no positive rules are fixed. It depends on the merit of salvors, in estimating which, a variety of considerations have their influence. * 366

In the case before the court, the opinion of the majority is, that the sentence of the circuit court ought to be affirmed. This opinion, however, is made up on different grounds. Two of the judges are of opinion that the award was fairly entered into, and although both parties might be mistaken with respect to the obligation created by the law of Delaware, yet there is no reason to suppose any imposition on either part; nor is there any other ground on which the award can be impeached or set aside. Two other judges, who do not think the award obligatory, view it as the opinion of fair and intelligent men, on the spot, of the real merit of the salvors, and connecting it with the testimony in the cause, are in favour of the salvage which has been awarded, and which has been allowed by the sentences of the district and circuit courts. Three judges are of opinion that the award is of no validity, and ought to have no influence. They think the conduct of the salvors, in taking the goods out of the possession of the revenue officer, though by legal process, is improper, and that the salvage allowed is too great.

They acquiesce, however, cheerfully in the opinion of the majority of the court, and express their dissent from that opinion, solely for the purpose of preventing this sentence from having more than its due influence on future cases of salvage.

The sentence of the circuit court is affirmed, *without costs*.

*SHEARMAN *v.* IRVINE'S LESSEE.

The act of limitations of Georgia does not acquire an entry into lands within 7 years after the title accrued, unless there be some adversary possession or title to be defeated by such entry.

ERROR to the circuit court for the district of Georgia, in an action of ejectment, brought (on the 15th of October, 1804,) by *Irvine's Lessee* against Shearman, for a tract of land in Camden county, in the state of Georgia.

The defendant below took a bill of exceptions to the refusal of the court to nonsuit the plaintiff on the trial, because he had not proved "an entry within seven years *after the title of the grantees accrued*, or any entry by either of the heirs or persons claiming under the grantees within seven years after their titles respectively accrued."

The lessor of the plaintiff had produced in evidence two grants from the province of Georgia, in 1766, to Alexander Baillie, under whom he claimed title by descent, and whose heir at law he had proved himself to be.

There was no evidence of title, or even of adverse possession, on the part of the defendant, before the bringing of the suit, other than the averment of *ouster* in the declaration, which was laid on the 10th of September, 1804; nor any evidence of title out of the lessor of the plaintiff.

In support of his motion for a nonsuit, the defendant relied on the act of limitations of Georgia, passed in the year 1767, by which it is enacted, "That all writs of *formedon* in *descender*, *remainder*, and *reverter* of any lands, &c. or any other writ, suit or action whatsoever, hereafter to be sued or brought, by occasion, or means of any title heretofore accrued, happened, or fallen, or which may hereafter descend, happen, or fall, shall be sued or taken within seven years next after the passing of this act, or after the title *and cause of action* * 368 shall or *may descend or accrue to the same, and at no time after the said seven years. And that no person or persons that now hath, or have any right or title of entry into any lands, &c. shall at any time hereafter make any entry, but within seven years next after the passing of this act, or after his or their right or title shall or may descend or accrue to the same, and in default thereof, such persons so not entering, and their heirs,

shall be utterly excluded and disabled from such entry after to be made."

The verdict and judgment below being against the defendant, he sued out his writ of error.

There being no appearance in this court for the plaintiff in error,

P. B. Key, for the defendant in error, opened the record, and prayed an affirmance of the judgment.

1. Because, from the facts disclosed, after the descent had been cast nearly thirty years, and no adverse possession at any time proved, the jury had a right *to presume* and *find* an actual entry within seven years; if such actual entry was necessary.

2. Because, in this case, on the facts disclosed, no entry was necessary. Two things only must concur to complete a title. *Possession*, and the *right of property*. The right of property is proved to be in the plaintiff as heir of the patentee; and possession by operation of law accompanies the title, unless the contrary is shown; and *until* it is shown.

If possession is taken by a wrongdoer, and severed from the title, (of which there is no evidence in this case,) then such naked possession, so acquired, may be defeated, either by *entry of the owner*, which is an act *in pais*, revesting the possession, and again uniting it with the right; or *by ejectment*, which is an act of law, to recover the possession with damages, &c.

If a wrongdoer, after taking possession, dies in possession, and a descent is cast, this, under some circumstances, *changes the title to a *right of entry*, or rather * 369
makes an *actual entry* necessary to give effect to the title. There are many cases in which actual entry is necessary to reunite the title with the possession, and for these cases the law of Georgia was made. But it cannot apply to a case where the title and the possession have not been separated.

That law requires two things:

1st. When the right is changed to a mere *right of entry*, or *where an entry is indispensable to complete the title*, then such entry must be within seven years from the accruing of such right of entry. But this does not apply to the case on the record. No disseisin, discontinuance, dissent, or adverse possession existed to make

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an actual entry necessary on the part of the plaintiff. The title and the possession were both in him.

2d. The statute gives remedy by ejectment within seven years *after the cause of action accrued.* In this case no cause of action accrued till the 10th of September, 1804, when the plaintiff's possession was disturbed. So long as it remained undisturbed he could not bring suit.

MARSHALL, Ch. J. The error alleged is founded on a construction of the act of Georgia, which this court thinks is totally inadmissible. How such an opinion could have been entertained is unaccountable. There is no foundation for it.

Judgment affirmed, with costs.

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*MORGAN *v.* CALLENDER.

An appeal lies from the district court of the United States, for the territory of Orleans, to this court.

APPEAL from the district court of the United States for the territory of Orleans, in a suit in equity.

That court was established by the act of congress, of 26th *March*, 1804, vol. 7. p. 117. s. 8. and has a jurisdiction similar to that given to the district court of the United States for the district of Kentucky.

This Court was of opinion that an appeal lies from that court to this; but that in this case, the court below had not jurisdiction, because it did not appear that the parties were citizens of different states, nor aliens, &c. so as to give them a right to litigate in the courts of the United States.

ALEXANDER *v.* THE BALTIMORE INSURANCE COMPANY.

ERROR to the circuit court for the district of Maryland.

A policy upon *a ship* is an insurance of the ship *for* the voyage, not an insurance on the ship *and* the voyage. The underwriters undertake for the *ability* of the ship to perform the voyage, not that she *shall* perform it at all events.

The *Chief Justice*, in delivering the opinion of the court, stated the material facts, found by the special verdict, to be as follows, viz.

This action was brought against the underwriters to recover the amount of a policy insuring the *ship John and Henry*, from Charleston to Port Republican, or one other port in the Bite of Leogane. On the 2d of October, 1803, the John and Henry, while prosecuting her voyage, was seized by a French privateer, and carried into the port of *Mole St. Nicholas*, where the cargo *was taken by *M. de Noailles*, the French commandant, for the use of the garrison. On the same day the master of the vessel received a written engagement from M. de Noailles to pay for the cargo in coffee, after which the vessel was unladen. The captain remained at the Mole in expectation of receiving payment, until the 29th of October, when he sailed in the John and Henry for *Cape François*, with an order on that place for payment in coffee. On the 4th of November she was seized by a British squadron then blockading Cape François, and condemned as prize. Cape François is not in the route to *Port Republican*, nor to any port in the *Bite of Leogane*; nor in the route to return from *Mole St. Nicholas* to the United States. The abandonment was made in December, on account of the capture by the French privateer. The declaration claims the amount of the policy in consequence of that capture. The judgment of the court below was for the defendant.

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The loss of the voyage as to the cargo is not a loss of the voyage as to the ship.

If at the time of the offer to abandon, the ship be in possession of the master, in good condition, and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the vessel to recover as for a total loss of the vessel.

The only question decided by this court was, whether the plaintiff had a right to abandon and recover as for a total loss.

Harper, for the plaintiff.

It was settled by this court in *Rhinelander's Case*, at the last term, (*ante*, p. 29.) that a loss by capture is a total loss, unless the restoration be complete and without en-

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cumbrance. It must be a restoration of the vessel in safety. There is a physical and a legal safety. A vessel may be restored in good order, and in safety, but under such circumstances that the party can make no use of her. It may be in a blockaded port, or in a place where mariners cannot be obtained to navigate the vessel; or where the party has no funds to provide a cargo, &c. In these cases he loses the beneficial use of his property, as much as if it were actually withholden from him by force.

If the ship or the *voyage* be lost, it is a total loss within the policy. Here the voyage was completely broken up; the object of the voyage, the speculation, was destroyed. The restoration ought to be a restoration of the voyage, a reinstatement of the enterprise, or it is not
*372 *a restoration which will prevent the loss from being total.

In *Cazalet* v. *St. Barbe*, 1 *T. R.* 191. *Judge Buller* says, "If either the ship *or the voyage* be lost, *that is a total loss.*"

So in *Mitchell* v. *Edie*, 1 *T. R.* 615. he says "A total loss is of two sorts, one, where in fact the whole of the property perishes; the other, where the property exists, but the *voyage* is lost, or the expense of pursuing it exceeds the benefit arising from it."

So in *Goss* v. *Withers*, 2 *Burr.* 696. Lord *Mansfield*, said, "The disability to *pursue the voyage* still continued. The master and mariners were *prisoners*. The *charter-party* was *dissolved*. The *freight* was *lost*." These he gives as reasons why it continued a total loss of the ship, notwithstanding the restoration.

So in *Hamilton* v. *Mendez*, 2 *Burr.* 1209. he says, "It does not necessarily follow that because there is a recapture, therefore the loss ceases to be total. If the *voyage* is absolutely lost, or not worth pursuing; if the salvage is very high; if further expense is necessary; if the insurer will not engage, in all events, to bear that expense, though it should exceed the value or fail of success; under these, and many other like circumstances, the insured may disentangle himself, and abandon, notwithstanding there has been a recapture."

So in *Miles* v. *Fletcher*, *Doug.* 233. he says, "The *voyage* was abandoned, the *cargo sold*, and the ship left

to be sold." "There was no crew belonging to her, and she had no cargo." These are reasons given by him why the loss of the *ship* was total.

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The same doctrine is supported by the cases of *The Sarah Galley*, *Storey* v. *Brown*, *Trin.* 18, 19 *Geo.* II. *anno* 1746, *B. R. Weskett*, 416. *The Anna Hanbury* v. *King*, *Mich.* 19 *Geo.* II. 1746, *B. R. Weskett*, 417. And the *Dispatch Galley*, *Whitehead* v. *Bance*, *Mich.* 23 *Geo.* II. 1749, *B. R. Weskett*, 417. *Kulen Kemp* v. *Vigne*, 1 *T. R.* 310. *Rotch* v. *Edie*, 6 *T. R.* 413. *424, 425. *Millar*, 284. and *Wheeler* v. *Valejo*, *Cowper*, 147. *Schmidt* v. *United Ins. Co.* 1 *Johns. Rep.* 249. And *Goold* v. *Shaw*, *Lex Merc. Americana*, 295. * 373

Martin, contra.

The loss of the *cargo* has nothing to do with the question of the loss of the *ship*. This policy is merely on the *ship* for the voyage. She might have proceeded and completed the voyage insured. The loss of the voyage as to the *cargo* is not a loss of the voyage as to the *ship*. This is not an insurance upon the *freight*. *That* was insured by another policy. It is merely a policy upon the bulk of the ship.

March 11.

MARSHALL, Ch. J. after stating the facts of the case, delivered the opinion of the court, as follows, viz.

It has been decided in this court, that during the existence of such a detention as amounts to a technical total loss, the assured may abandon; but it has also been decided that the state of the fact must concur with the state of information to make this abandonment effectual. The technical total loss, therefore, occasioned by the capture and detention at Mole St. Nicholas, must have existed in point of fact in December, when this abandonment was tendered, or the plaintiff cannot succeed in this action.

Previous to that time the vessel had been restored to the captain; all actual restraint had been taken off; and it does not appear that her ability to prosecute her voyage was in any degree impaired. But her cargo had been taken by Monsieur de Noailles, the commandant at Mole

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St. Nicholas, and had not been paid for. The restoration of the vessel, without the cargo, is said not to terminate the technical total loss of the vessel.

The policy is upon the vessel alone, and contains no allusion to the cargo. Had she sailed in ballast, that circumstance would not have affected the policy. The * 374 *underwriters insure against the loss or any damage to the vessel, not against the loss or any damage to the cargo. They insure her ability to perform her voyage, not that she shall perform it.

If, in such a case, a partial damage had been sustained by the cargo, no person would have considered the underwriters as liable for that partial damage; why, then, are they responsible for the total destruction of the cargo? It is said that by taking out the cargo the voyage is broken up. But the voyage of the vessel is not broken up; nor is the mercantile adventure destroyed from any default in the vessel. By this construction the underwriter of the vessel, who undertakes for the vessel only, is connected with the cargo, and made to undertake that the cargo shall reach the port of destination in a condition to answer the purposes of the assured. Yet of the cargo he knows nothing, nor does he make any inquiry respecting it.

If it be true that the technical total loss was not terminated until the cargo was paid for, because the voyage was broken up, then the underwriters would have been compellable to pay the amount of the policy, although the vessel had returned in safety to the United States. To prosecute the voyage, it is said, had become useless, and, therefore, the engagement of the underwriters was forfeited, although this state of things was not produced by any fault of the vessel. If this be true, it would not be less true if, instead of proceeding to Cape François, the Henry and John had returned from Mole St. Nicholas to the port of Charleston. The contract, then, instead of being an insurance on the ability of the ship to perform her voyage, an insurance against the loss of the ship upon the voyage, would be a contract to purchase the vessel at the sum mentioned in the policy, if circumstances, not produced by any fault or disability in the vessel, should induce the captain or the assured to discontinue the voyage after it had been undertaken.

This is termed pushing a principle to an absurdity,

and, therefore, no test of the truth of the principle. But if it be a case which would occur as frequently as that which has occurred, and if the result which has been *stated flows inevitably from the principle insisted on, the case supposed merely presents that principle in its true point of view, deprived of the advantages it derives from its being adapted to the particular and single case under argument. Either the technical total loss of the ship did or did not terminate when she was restored to the master uninjured, and as capable of prosecuting her voyage as when she sailed from the port of Charleston. If it was then terminated, this action cannot be sustained. If it was not then terminated, on what circumstance did its continuance depend? At one time it is said to depend on the ability or inability of the owner to employ her to advantage. But this position requires a very slight examination to be discarded entirely. So far as respected the vessel herself, and her crew, she was as capable of being employed to advantage as she had ever been. Only the funds were wanted to enable her to purchase a return cargo on the spot, or to proceed to her port of destination, and there purchase one. Or she might have returned immediately to the United States, and if any direct loss to the vessel was sustained, by being turned out of her way, that, after restoration, would be a partial not a total loss. Besides, what dictum in the books will authorize this position? And what rule is afforded to ascertain the degree of inconvenience which, when in point of fact the vessel is in safety, in full possession of the master, and capable of prosecuting her voyage, shall warrant an abandonment?

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No total loss of the vessel, then, existed after her restoration, so far as that total loss depended on the incapacity of the owner to employ his vessel to advantage. If the total loss continued after the restoration, that continuance was produced singly by the non-payment for the cargo, which is said to have broken up the voyage. If, then, the vessel had returned to a port in the United States, the voyage would still have been broken up, and the right to abandon would have been the same as it was while she was on the ocean, in full possession of her captain.

*But it is apparent that the captain had terminated the * 376

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voyage on which the vessel was insured. Had his contract with De Noailles been complied with at Mole St. Nicholas, or at Cape François, he would not have proceeded to the Bite of Leogane. Had it not been complied with, he would have had no more inducement to go to a port in the Bite of Leogane from Cape François, than from Mole St. Nicholas. The voyage to Port Republican, then, which was the voyage insured, was completely terminated at Mole St. Nicholas; the voyage to Cape François, in making which she was captured, was a new voyage undertaken, not for the benefit of the underwriters of the vessel, but for the benefit of the owners and underwriters of the cargo. Consequently, so far as respects the underwriters of the vessel, who insured only the voyage to the Bite of Leogane, the capture at Cape François is an immaterial circumstance, and the technical total loss produced by carrying the vessel into Mole St. Nicholas, was either terminated when she was restored without her cargo, or would have continued had she returned to an American port without her cargo.

Upon principle, then, independent of authority, it is very clear that the underwriter of the vessel does not undertake for the cargo, but engages only for the ability of the vessel to perform her voyage, and to bear any damage which the vessel may sustain in making that voyage.

But it is contended that adjudged cases have settled this question otherwise.

The case has frequently occurred, and a direct decision might be expected on it, if a construction so foreign from the contract had really been made. It often happens that the cargo of a neutral vessel is condemned as enemy property, and the vessel itself is discharged.

Not an instance is recollected in which the right to abandon in such a case, after the vessel was restored, has been claimed. Yet, if the loss of the cargo amounted to a destruction of the voyage, so far as respected the vessel, and thereby created a total loss of the vessel *herself, notwithstanding her restoration to the captain uninjured, and in a full capacity to prosecute her voyage, such claims would be frequently asserted, and vessels would be valued high in the policy, for the purpose of selling them on a contingency which so often

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occurs. It would be strange, indeed, to admit, that if this cargo had been condemned in Mole St. Nicholas, and the vessel had been liberated, the right to abandon would not have been produced by the loss of the cargo, and yet to contend that non-payment for the cargo does produce that right.

In recurring to precedent, no direct decision by a court on the point, no direct affirmance of the principle has been adduced; but the counsel for the plaintiff relies on general *dicta* in the books which are used in reference to other principles. Thus, in 1 *Term Rep.* 191. Judge Buller says, "*It is an assurance on the ship for the voyage.* If either the ship or the voyage be lost, it is a total loss."

In that case, the counsel for the plaintiff contended that the insurance was on the ship, and on the voyage, and insisted, that as the vessel returned unfit for use, it was a total loss. The counsel for the defendants was stopped, and Judge Buller said, "Allowing *total loss* to be a technical expression, the manner in which the plaintiff's counsel have stated it is rather too broad." Why too broad? Judge Buller answers, "It has been said that the insurance must be taken to be on the ship as well as on the voyage, but the true way of considering it is this; it is an insurance on the ship *for* the voyage. If either the ship or the voyage be lost, that is a total loss."

In what consists the difference between an insurance on the ship *and* the voyage, which is laying down the principle too broad, and an insurance on the ship *for* the voyage, which is the true way of considering it? If the destruction of the voyage by the loss of the cargo is a loss of the ship, then it is an insurance on the ship *and* the voyage. But this, according to Judge Buller, is not the true principle. The true principle is, that "it is an insurance on the ship *for* the voyage," *that is, that the voyage shall not be destroyed by the fault of the ship, or, in other words, that the ship shall be capable of making her voyage. And when he says that if either be lost it is a total loss, he must be understood to mean, if the voyage be lost by the hap ening to the ship of any of the perils insured against. To understand Judge Buller otherwise, would be to make him inconsistent with himself; to illustrate a proposi- * 378

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tion by cases incompatible with that proposition; and to support a distinction by cases which confound the principles intended to be distinguished from each other. But these expressions are used in a case in which the whole contest respected the damage actually sustained by the ship insured, and must be understood in reference to such a case.

So in 1 *Term Rep.* 615. *Mitchell* v. *Edie*, Buller, J. says, "A total loss is of two sorts. One where in fact the whole of the propety perishes;" (that is, the property insured;) "the other where the property exists, but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it."

This was a case in which the cargo, which was the thing insured, was, by one of the perils insured against, prevented from reaching its destined port, and was greatly damaged. The expressions must be explained by the case, for the case itself is in view when the expressions are used.

A *dictum* of Judge Buller, in 1 *Term Rep.* 310. is more applicable to this case than either of those before quoted. He says, "If the ship had arrived, and the goods had been lost, the assured could not have recovered." That was an insurance on the arrival of the ship. It is said that *dictum* was founded on its being a wagering policy; but it appears to be a construction of the terms of the policy. He proceeds to say, that "in policies on interest, if the voyage be lost, it is not necessary to proceed on with the hulk of the ship." But to what case does this apply? To an insurance on goods or on the ship? To a loss of the voyage by default of the thing insured and abandoned, or by default of the thing not insured? The *dictum* is too vague
* 379 and too unsatisfactory to form the basis of a great *legal principle of infinite importance in commercial transactions. If that case be read throughout, *dicta* may be found interspersed through it which militate against the doctrine this single sentence is supposed to support.

In the case of *Goss* v. *Withers*, there were two policies, one on the ship and the other on the cargo. The language of Lord *Mansfield*, in delivering the opinion of the court with respect to the ship, does not even insinuate the idea that any damage sustained by the cargo would have affected the policy on the ship.

In deciding on the claim for the cargo, his language is to be considered with reference to the case itself. It does not appear whether, in the passage quoted from *Le Guidon*, the author of that work was treating of an abandonment as to the ship or cargo, or both. Nor does it in any degree tend to establish the principle contended for, that after stating the actual total loss of the goods, Lord *Mansfield* mentions, as an additional circumstance, showing the complete destruction of the voyage, that the ship was lost also.

In the case of *Hamilton* v. *Mendez*, neither the ship nor cargo was lost. Lord *Mansfield* puts cases in which there might be a total loss, but those cases are not stated with such precision as to throw any light on the present question. He says it does not absolutely follow that, because there is a recapture, the loss ceases to be total. "If the voyage is absolutely lost, or not worth pursuing," and in many other instances, the owner may disentangle himself, and abandon notwithstanding there has been a recapture.

It is extremely dangerous to take general *dicta* upon supposed cases not considered in all their bearings, and at best, inexplicitly stated, as establishing important law principles. Let the *dictum* in the present case be examined. Suppose the ship and cargo to be owned by different persons, and insured by different underwriters. If the voyage be lost by the infirmity of the ship, the abandonment might unquestionably be made. If the *goods* be damaged or injured, so as to occasion a technical *total loss, so as to render the voyage not worth * 380
pursuing, the owner of the *cargo* may abandon; but how does this render the voyage not worth pursuing by the owner of the *vessel?* The value of the *cargo* does not affect him, or injure the vessel. With respect to him, the voyage is not destroyed. These *dicta* of Lord *Mansfield* are uttered in terms which demonstrate that no case like the present was in his view at the time, and they are not adapted to such a case.

The cases from *Weskett* are upon a peculiar kind of policy. They are in the nature of wager policies, and the nature of the undertaking is said to be, that the ship shall perform her voyage in a reasonable time. "In these two last kinds of policies," says Weskett, "valued free from average" and "interest or no interest,

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it is manifest that the performance of the voyage or adventure in a reasonable time and manner, and not the bare existence of the ship and cargo, is the object of the insurance." This remark applies only to policies of the particular specified description; and even with respect to them it would not appear that the fate of the ship depended on that of the cargo. In illustration of this principle he states the case of *The Ludlow Castle* insured from Jamaica to England. She was compelled by one of the perils insured against, to put into Antigua, where she was stopped from proceeding on her voyage, and her cargo was sent to England in another vessel. At the time of the abandonment, and even at the time of the trial, the vessel had not arrived in England, and was not restored to the owner. In this case the voyage was lost by the inability of the vessel to prosecute it.

The case of *The Sarah Galley* bears a much stronger resemblance to that under consideration, but is not so fully stated as to give the court all its circumstances. It does not precisely appear what damage was sustained by the seizure at Gibraltar, nor what effect that loss might have on the jury. Nor are we informed at what time, and for what cause the abandonment was made.

But the great objection to that case is, that it was the verdict of a jury, not the solemn decision of a court,

* 381 *which verdict was rendered at a time when the law of insurance was not settled, and most probably on a point which has since been overruled in England and in this country. The loss of the ship on a voyage from Gibraltar to Dunkirk could not be the fact on which the plaintiff recovered, because that was a voyage not within the policy. The seizure at Gibraltar was the fact on which the jury founded their verdict. The defendant contended that this total loss was terminated by the restoration of the ship; "yet as the taking at Gibraltar was a taking whereby the return voyage was prevented, a special jury gave the plaintiff a verdict for a total loss." The verdict, then, is found not on the subsequent actual loss of the vessel, but on the technical loss occasioned by the seizure. This verdict was rendered in the reign of George II. At that time it was doubtful whether a technical total loss occasioned by capture did not vest in the assured a right to abandon, which right was not devested by restoration. In

the case of *Hamilton* v. *Mendez*, which came on afterwards, this point was perseveringly maintained at the bar, and settled by the court. Had the case of *The Sarah Galley* been decided after the case of *Hamilton* v. *Mendez*, a different verdict must have been rendered. But this decision was given exclusively on the circumstances which had befallen the ship, without a view, so far as is stated, to any loss of the cargo, and is considered by *Millar* (288.) as not being law.

The case of *The Anna* turned entirely on the inability of the ship to prosecute her voyage.

The case of *The Dispatch Galley* is a case in which we are not informed of the amount of loss occasioned by capture and recapture; and is also a case decided before *Hamilton* v. *Mendez*, most obviously upon the principle that the right to abandon, which was vested by the capture, was not devested by the restoration of the vessel. This case serves to show that the verdict in the case of *The Sarah Galley* did not turn on the subsequent loss of the vessel, for this vessel was not lost. There is in it no allusion to any influence which the loss of a cargo might have on the insurance of a vessel.

*The principles laid down by *Millar* do not militate against those which are contained in this opinion. When he speaks of a loss which defeats the voyage, he alludes to a loss which has befallen the thing insured. * 382

The court can find in the books no case which would justify the establishment of the principle, that the loss of the *cargo* constitutes a technical loss of the *vessel*, and must, therefore, construe this contract according to its obvious import. It is an insurance on the *ship for the voyage*, not an insurance on the ship *and* the voyage. It is an undertaking for the ability of the ship to prosecute her voyage, and to bear any damage which she may sustain during the voyage, not an undertaking that she shall, in any event, perform the voyage.

It is the unanimous opinion of the court that the judgment must be affirmed, with costs.

Judgment affirmed.

MATTHEWS *v.* ZANE.

If two citizens of the same state, in a suit in a court of their state, claim title under the same act of congress, this court has an appellate jurisdiction to revise and correct the judgment of that court, in such case.

ERROR to the *state* court of the state of Ohio, under the 25th *section of the judiciary act*, vol. 1. p. 63.

The plaintiff in error claimed title to land in the state of Ohio, under the act of congress, passed in 1800, and the decision of the state court was against him.

The defendant in error also claimed title to the same land under the *same act of congress*.

The question was, whether in such a case this court had an appellate jurisdiction to revise the judgment of a state court.

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**Harper*, for the defendant in error, contended, that the reason of bestowing upon this court the power of revising the decisions of the state courts, upon points arising under the laws of the United States, was merely to maintain the authority of the laws of the United States, against the encroachments of the state authorities. But that it was not intended to give this court the power to revise the decision of a state court, in a controversy between two of her own citizens, claiming under the same act of congress; for whether the one or the other recovered, the authority of the laws of the United States was equally supported. The power was given merely to prevent the laws of the United States from being frittered away by state jealousies and state powers.

P. B. Key, contra, contended, that the intention was to give a uniform construction to the laws of the United States; and that whenever a state court of the highest grade shall have given a false construction to an act of congress, to the prejudice of a right claimed under such act of congress, this court is empowered to correct the decision; and that it is altogether immaterial whether both parties are citizens of the same state, or whether both claim under the same act of congress.

The Court at first hesitated as to the jurisdiction, but upon consultation together and deliberation,

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MARSHALL, Ch. J. declared it to be the opinion of a majority of the judges, that this court has jurisdiction.

That the third article of the constitution of the United States, when considered in connection with the statute, will give it a more extensive construction than it might otherwise receive.

It is supposed that the act intends to give this court the power of rendering uniform the construction of the laws of the United States, and the decisions upon rights or titles, claimed under those laws.

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ERROR to the circuit court for the district of Columbia, sitting at Alexandria.

An appeal or writ of error lies from the judgments of the circuit court of the district of Columbia, to this court, in cases where the bank of Alexandria is plaintiff, and the judgments below are in its favour, notwithstanding the clause in its charter to the contrary.

The right of Virginia to legislate for that part of the district of Columbia which was ceded by her to the United States, continued until the 27th of February, 1801.

The act of Virginia incorporating the bank of Alexandria is a public law.

C. Simms, for the defendant in error, having obtained a rule on the *plaintiff in error* to show cause why the writ of error should not be quashed,

Youngs, *E. J. Lee*, and *Jones* now showed cause; and read a printed paper produced by the other side purporting to be the act of assembly of Virginia, of 1792, incorporating the bank, and giving them a right to obtain judgments against their debtors at the first term, without appeal or writ of error; another printed paper, also produced by the other side, purporting to be the act of assembly of Virginia, of the 21st of January, 1801, continuing the act of 1792 until the year 1811, which would otherwise have expired in the year 1803; the act of congress of the 27th of February, 1801, erecting the circuit court for the district of Columbia, and providing for an appeal or writ of error to this court, in all cases where the matter in dispute shall exceed the value of one hundred dollars, with a proviso that nothing in that act should impair the rights granted by, or derived from, the acts of incorporation of any body corporate within the district; the act of assembly of Virginia, of 1789, ce-

Quære, whether private acts of assembly of Virginia printed by the public printer of that state, under the authority of law, may be read in evidence without other authentication.

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ding to the United States a territory for the seat of their government, and the act of congress of 1790, accepting the cession.

They contended,

1. That when the legislature of Virginia passed the act of 21st *of January*, 1801, continuing the act of 1792, which incorporated the bank, the state of Virginia had no power to legislate for the district of Columbia, and, therefore, could not give continuance to the act of 1792, as a law in that district. The consequence of
* 385 *which is, that there is now no law in the district of Columbia which gives to the bank any exclusive privileges.

2. That the act of Virginia, of 21st of January, 1801, was not adopted as the law for the district of Columbia, by the act of congress of 27th of February, 1801.

3. That if the act of 21st of January, 1801, was adopted as to its general provisions, yet so much of it as takes away the right of appeal was not adopted, because inconsistent with that part of the adopting law which gives an appeal or writ of error, in all cases where the matter in dispute exceeds the value of 100 dollars.

4. That the acts of 1792, and 21st of January, 1801, were private acts, and that the papers read, purporting to be those acts, were not sufficiently authenticated, and could not be noticed by the court.

The points being opened, the court requested to hear the counsel on the other side.

C. Simms, for the bank.

The first question is, whether the right of Virginia to legislate for the district of Columbia ceased on the 1st Monday in December, 1800, when the district became the seat of the national government, or on the 27th of February, 1801, when congress first provided by law for the government of the district under their jurisdiction. By the act of assembly of Virginia, passed on the 3d of December, 1789, for the cession of a territory for the permanent seat of the general government, (*Revised Code*, p. 52.) it is enacted, "That a tract of country, not exceeding ten miles square, or any lesser quantity, to be located within the limits of this state, and in any part thereof as congress may by law direct, shall be, and the same is hereby, forever ceded and relinquished to the congress and government of the United States, *in full*

and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the 8th section of the 1st article of the constitution of government of the United States."

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*" Provided, that the jurisdiction of the *laws* of this commonwealth, over the persons and property of *individuals* residing within the limits of the cession aforesaid, shall not cease or determine *until congress*, having accepted the said cession, *shall by law provide for the government thereof, under their jurisdiction*, in manner provided by the article of the constitution before recited."

By the act of congress of 16th *of July*, 1790, *for establishing the temporary and permanent seat of the government of the United States*, vol. 1. p. 132. it is enacted, "That a district of territory, not exceeding ten miles square, to be located as hereafter directed, on the river Potomac, at some place between the mouths of the *Eastern Branch*, and *Connogochegue*, be, and the same is hereby accepted for the permanent seat of the government of the United States; *provided nevertheless*, that the *operation of the laws* of the state, within such district, shall not be affected by this acceptance, until the time *fixed* for the removal of the government thereto, and until congress shall otherwise by law provide.

The time for the removal of the government to the district was, by the same act, *fixed* to be the first Monday in December, 1800.

The government having been on that day removed to the district, congress did not by law provide for the government thereof, under their jurisdiction, until the 27th of February, 1801: until which day, we contend, the jurisdiction of the laws of Virginia, or, in other words, the right of Virginia to legislate for the district, did not cease or determine. Virginia had, therefore, a right to pass the act of 21st of January, 1801, which was, consequently, one of the existing laws of Virginia, in the district of Columbia, on the 27th of February, 1801, when congress enacted, "That the laws of Virginia, as they *now* exist, shall be and continue in force in that part of the district of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of the government."

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*There are only two instances in which congress have referred to the *1st Monday of December*, 1800, as the period of separation, viz. in the act of 3d *March*, 1801, s. 7. vol. 5. p. 290. authorizing the sheriffs of the adjoining counties in Maryland and Virginia, to proceed to collect taxes and officers' fees, due before that day; and in the act of *May* 3d, 1802, s. 13. vol. 6. p. 183. which refers to the militia laws of the states of Maryland and Virginia, as they stood in force in the district, on the 1st Monday of December, 1800.

The right of the bank to obtain judgment against their debtors at the first term without appeal, is a right granted to them by their act of incorporation, and is, therefore, saved by the proviso of the statute of 27th February, 1801, and is, therefore, an exception to the general clause which gives a right of appeal in all cases.

But it is contended that the acts of Virginia, incorporating the bank of Alexandria, are private acts, and that the printed papers now produced ought not to be regarded by the court as evidence of the existence of such acts. The acts which we read to the court, are found printed with, and bound up among, the public acts of the commonwealth. The title page declares the book to contain the acts of assembly of the commonwealth of Virginia, and to be printed by Augustine Davis, who, we are ready to prove, was the public printer for the years when those laws were passed. By the act of assembly of Virginia, of 22d January, 1798, the public printer is to be appointed annually, by the joint ballot of both houses, and it is made his duty to publish *all* laws passed during the session. (*New Rev. Code*, 382.) The executive is also bound by law to send copies of all the laws, when printed, to the clerks of the courts, &c. and by another statute, private acts of assembly may be given in evidence, without pleading them specially. (*New Rev. Code*, 59. 112.)

There is a difference between the laws of Virginia and those of England, respecting the authentication of private acts. In England they are never printed nor promulgated, but remain with the clerk of parliament. But
*388 in Virginia they are printed and promulgated by the *authority of the legislature, and are as well authenticated as public acts.

But this is a public act.

CHASE, J. The act makes it felony to counterfeit the notes of this bank. Does not that make it a public act?

MARSHALL, Ch. J. said, that the opinion of the court was very strong that this is a *public* act; and that if it were not, it being printed by the public printer, by order of the legislature, agreeably to a general act of assembly for that purpose, it must be considered as sufficiently authenticated. But that the court would not prevent counsel from arguing the point, if they thought they could support the contrary opinion; which the counsel declined attempting.

At the opening of the court, on the next morning,

Youngs, for the plaintiff in error, being about to reply,

MARSHALL, Ch. J. said, the court is so much of opinion that the point is decided by the case of *Wilson and Mason*, (*ante*, vol. 1. p. 91.) that they are inclined to hear the other side.

By the Virginia land law, no appeal or writ of error is allowed in *caveats;* and by the compact between Virginia and Kentucky, that law was immutable; yet this court, in *Wilson and Mason*, decided that the act of congress which gives a writ of error in all cases, so far repealed the state law, as to prevent it from operating upon the United States court for the district of Kentucky.

JOHNSON, J. Perhaps a distinction may be drawn between that case and this. If the bank of Alexandria had a vested right under the act of incorporation, it is saved by the proviso in the act of 27th of February, 1801.

**The Court* thereupon directed Youngs to proceed in his argument. **389*

Youngs, for the plaintiff in error.

By the 8th section of the 1st article of the constitution of the United States, power is given to congress, "To exercise *exclusive legislation* over such district, not exceeding ten miles square, as may by cession of particular states, and the acceptance of congress, become the seat

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of the government of the United States." The moment the district became the seat of government, congress had the right of exclusive legislation over it. There could be no concurrent rights of exclusive legislation. The idea is absurd and impossible. There can be but one right of exclusive legislation, and by the constitution of the United States, it was vested in congress. It is not necessary that congress should have exercised the right in order to vest it in themselves. It must have vested in them before they could exercise it. The district of Columbia, both in law and in fact, became the seat of government of the United States, on the 1st Monday of December, 1800. From that moment the right of the state of Virginia to legislate over the district ceased. It could make no law to affect the property or persons within it. Virginia did not attempt it. She knew she had no power, and, therefore, she has used language appropriate only to her own territory. She has authorized the stockholders to choose their directors in the state of Virginia out of the district. She speaks of the town of Alexandria as being "in that part of the district of Columbia, which *heretofore* formed a part of this commonwealth."

Three things only were necessary to vest the exclusive power of legislation in congress. A cession of territory by some of the states; an acceptance by congress; and the ceded territory being actually the seat of the government of the United States. These events had all happened on the first Monday of December, 1800. No further act was necessary. The right to legislate was complete and exclusive whether congress exercised it or not.

* 390 *But it is said that if Virginia could not legislate for the district of Columbia, yet she could legislate for herself; and congress by the act of 27th February, 1801, adopted *all* her laws as they *then existed.*

As they existed *where?* we say as they then existed *in the district of Columbia;* that was the territory over which congress was legislating, and their object was merely to *continue* in force the laws then existing in the district.

If Virginia had no right to legislate for the district of Columbia, when she passed the act of the 21st of January, 1801, that act was not in force, and did not exist as

a law, in the district of Columbia, on the 27th of February, 1801; and if it did not then exist as a law in the district, it could not be *continued* in force by the act of congress. The words of the act of congress are, "The laws of the state of Virginia, as they now exist, shall be and *continue* in force, in that part of the district," &c.

The legislatures of Virginia, and of the United States, both began their sessions on the same first Monday of December, 1800. It is not possible that congress, when they passed the act of the 27th of February, 1801, should know what acts Virginia had passed at that session. The laws of that session were not then promulgated; and it cannot be supposed that congress meant, blindfold, to adopt whatever Virginia should choose to enact. It cannot be presumed that congress would have adopted the act of 21st of January, 1801, if they had known it, because it was equivalent to giving the bank of Alexandria a new charter; and to give any bank a charter by a law of the United States, prior to the 4th of March, 1811, is to violate the public faith pledged to the bank of the United States. If, therefore, a doubt can be raised as to the intention of the United States, this court will not give the law such a construction as would violate the public faith.

There is another objection to that part of the act of Virginia, which gives exclusive privileges to the bank of Alexandria.

*It is directly repugnant to the bill of rights of Virginia, the fourth article of which declares, "That no man, *or set of men*, are entitled to exclusive or separate emoluments, or *privileges* from the community, but in consideration of public services." *391

MARSHALL, Ch. J. We will consider that point when we come to the general merits of the case.

Youngs. But if the court should quash the writ of error, they will never hear the merits.

CHASE, J. But if it *be* contrary to the constitution of Virginia, are *we* to decide upon its unconstitutionality? I must say I think we cannot.

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E. J. Lee, on the same side.

We do not contend that the bank has no charter; we admit that the bank still exists as a corporate body in Virginia, and may there exercise all its functions, choose its officers, keep its banking-house, and transact its business. But we say it has no peculiar privileges in the courts of the United States. We deny it has existence as a corporate body in the district of Columbia, and that the court below is bound by any of the remedies which the bank is entitled to in the courts of Virginia, by virtue of any law of Virginia, passed since the first Monday in December, 1800. It never had a right to its summary remedy in the courts of the United States, and, therefore, no such right could be saved by the proviso in the act of the 27th of February, 1801. We consider the case of *Wilson and Mason* as decisive.

Swann, contra.

There is a distinction to be taken between this case and that of *Wilson and Mason*. There the right of appeal was a *constitutional* right. It grew out of the constitution of the United States, which gave to the courts of the United States jurisdiction between citizens of different states, and to this court its appellate power. This is the ground taken by the court in delivering its opinion in that case.

* 392 *But the right of appeal in this district is not a constitutional right. The courts of this district are of legislative, not of constitutional creation. The power of this court to hear appeals from the circuit court of this district, is a power *not* derived from the constitution. This district is like a state, and congress legislates for it as a state legislature would for a state.

The act of the 21st of January, 1801, was an existing law operating upon this part of the district on the 27th of February, 1801. On the 21st of January, 1801, the jurisdiction of Virginia, *in all respects whatever*, existed over this district, and continued until congress, by an act, *assumed* the jurisdiction. Congress had *power* to exercise exclusive legislation, but was not *bound* to exercise it. Until they chose to exercise it by providing for the government of the district, the jurisdiction of the laws of Virginia was not to cease. What is the jurisdiction of the laws, but the jurisdiction of

the commonwealth? The jurisdiction of the laws comprehends the whole jurisdiction. If not the *whole* jurisdiction, what *part* does it comprehend? It was intended that there should be no *interregnum*, no time in which the inhabitants of the district should be without laws, and without the means of enforcing them. The jurisdiction of the courts and officers was to continue, as well as of the laws, considered as mere rules of conduct.

It is evident by the act of February 27, 1801, that congress considered the district as remaining under the jurisdiction of Virginia until that day.

The legislature of Virginia had the same understanding. The act of the 21st of January, 1801, says, the charter of the bank is *hereby* continued, which they could not do, unless they had jurisdiction. The court of hustings of Alexandria was also holden in January and February, 1801, by the justices holding their offices under Virginia.

Here, then, was the concurrent understanding of the congress, of the legislature of Virginia, and of the courts of that part of the district.

*But even if the power of Virginia to legislate for the district had ceased, the act of 21st of January was a law in Virginia on the 27th of February, 1801, and as such was adopted by the act of congress of that date. * 393

It is said that congress cannot be supposed to intend to adopt the laws of the session of Virginia, which began on the first Monday of December, 1801, because congress cannot be presumed to have had knowledge of them. But congress cannot be presumed to have had knowledge of all the laws which were in existence, in Maryland and Virginia, before that period. Yet they adopted them. They took them upon trust; and they had as much reason to adopt those of the session of 1800—1801, as those of any former period.

C. Simms, on the same side.

It is admitted that the jurisdiction of Virginia did not cease by the act of cession of 1789, nor by the act of acceptance of 1790; why should it cease on the first Monday of December, 1800? We say four things were necessary to devest the jurisdiction of Virginia, 1. The cession; 2. The acceptance; 3. The removal

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of the seat of government to the district; and, 4. The actual providing by congress for the government of the district under their jurisdiction. Only three of these four events had happened on the first Monday of December, 1800.

What reason is there for supposing that Virginia retained an executive and a judicial jurisdiction over the district, and not a legislative jurisdiction also? If she could legislate for the district, after the cession and acceptance, she retained that power until congress provided for the government of the district.

By the act of cession of 1789, individual rights were not to be impaired by the change of jurisdiction whenever it should take place. This provision applied not to rights then existing, but to any which might be acquired under the laws of Virginia, before the actual transfer of the jurisdiction; so that there was a pledge of the public faith, in favour of the bank of Alexandria,
* 394 prior to *that in favour of the bank of the United States. Before the transfer of jurisdiction, also, the bank of Alexandria had acquired a right to the summary remedy without appeal.

The plaintiff in error had no right to complain of the exercise of that summary remedy in his case. He knew the rights of the bank before he obtained their credit, and became their debtor.

The decision of this court in *Wilson and Mason* was predicated upon the principle that no act of a state legislature could deprive the courts of the United States of their jurisdiction; but here the act taking away the right of appeal has been adopted by congress, and therefore is in fact a law of the United States.

Jones, in reply.

If the decision be against the bank, it will only go to deprive them of an odious and oppressive prerogative which they have assumed. They may still enjoy the benefits of their charter in Virginia.

The distinction attempted to be drawn between this case and that of *Wilson and Mason*, is not founded in fact. The constitution of the United States gives to this court appellate jurisdiction in all cases arising under the constitution and laws of the United States, with

such exceptions and under such regulations as congress shall make.

The cases which occur in the district of Columbia, under the exclusive legislation of congress, are all cases which arise under the constitution and laws of the United States. Congress has not only *not* excepted them from the jurisdiction of this court, but has *regulated* the mode by which they may be brought before it.

The circuit court of the district of Columbia is a branch of the judiciary of the United States. It holds by the same tenure as every other court of the United States, and exercises a part of the judicial power of the United States, and this court exercises its appellate jurisdiction *as much under the constitution in these cases as in any other. * 395

It cannot be supposed that the constitution intended congress should create judges and courts, independent of the constitution.

The same general question, therefore, occurs in this case as in that of *Wilson and Mason;* and is to be decided by the same principles.

If it was intended to say that the general jurisdiction of Virginia should continue until congress should legislate for the district, the legislature of Virginia, and congress, would have said so expressly, and not used the limited expressions, "*jurisdiction of the laws*," and "*operation of the laws.*" The power of legislation may cease, and yet the jurisdiction of the laws remain, and the officers of justice still continue to exercise their functions by virtue of the compact. Such is the case in conquered and ceded countries. They generally, by treaty, remain under the jurisdiction of the old laws, and old officers, until new laws are enacted, and new officers appointed; and yet it is not contended that the old sovereign can legislate for them.

The act of congress accepting the territory, either explains or restricts the act of cession. It uses the expression, "*operation* of the laws" instead of "*jurisdiction* of the laws."

We contend they mean the same thing, *i. e.* that the laws shall remain as the rule of conduct, until altered or repealed by congress. Virginia and the United States were two sovereigns treating respecting a cession of territory. They agree that the cession shall take effect upon

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a certain event, and that the laws then existing in the ceded territory, shall continue until the new government shall otherwise provide.

This cession took effect on the 1st Monday of December, 1800, and by the terms of the cession and acceptance, the laws then in force in the district were to continue in
* 396 operation until congress should provide for the *government thereof. The laws, then, which were in force in the district on the 27th of February, 1801, were those only which were in force on the first Monday of December, 1800. By the act of 27th of February, congress declares that the laws of Virginia, *as* they *now exist*, shall *be and continue* in force, &c. The expression is not, *which* now exist, but *as* they now exist, which is descriptive of the manner in which they existed; that is, by virtue of the cession and acceptance.

March 12.

MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

This is a motion to quash a writ of error which has issued to a judgment obtained by the bank of Alexandria in the circuit court for the district of Columbia sitting in Alexandria. In support of the motion, it is contended that no writ of error lies to such a judgment.

The words of the act of congress of February, 1801, by which the circuit court for the district of Columbia was erected, are these: "Any final judgment, order or decree in the said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined, and reversed or affirmed, in the supreme court of the United States, by writ of error or appeal."

Upon the operation of this clause in the "Act concerning the district of Columbia," no doubt could be entertained, were it not produced by the last section, which enacts that nothing in that act contained "shall in any wise alter, impeach or impair the right granted by or derived from the acts of incorporation of Alexandria and Georgetown, or of any other body corporate or politic within the district."

The state of Virginia had, in November, 1792, passed

an act for establishing a bank in the town of Alexandria, which act incorporated the bank, and, in addition to the privilege of summary process for the recovery *of debts, deprived their debtors of the right of appeal.

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In January, 1801, the legislature of Virginia passed an act, continuing the charter of the bank to the 4th of March, in the year 1811, and authorizing them to transact business in the county of Fairfax.

It is the opinion of the majority of the court, under the terms of the cession and acceptance of the district, that the power of legislation remained in Virginia until it was exercised by congress.

But the question recurs, whether that part of the act of Virginia which takes away the right of appeal, taken in connection with the act of congress passed in February, 1801, is now in operation.

The words of the act of congress being as explicit as language can furnish, must comprehend every case not completely excepted from them. The saving clause in the last section only saves existing rights; it does not extend those rights, or give new ones. The act incorporating the bank professes to regulate, and could regulate, only those courts which were established under the authority of Virginia. It could not affect the judicial proceedings of a court of the United States, or of any other state.

There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate. The act of incorporation, then, conferred on the bank of Alexandria a corporate character, but could give that corporate body no peculiar privileges in the courts of the United States, not belonging to it as a corporation. Those privileges do not exist, unless conferred by an act of congress.

*The mere saving in an act of congress which expressly renders all judgments of the circuit court, for a larger sum than one hundred dollars, re-examinable by writ of error in this court, cannot be considered as exempting judgments rendered in favour of the bank, from the ope-

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ration of this general enacting clause respecting writs of error. If the act of March, 1801, be considered as giving the bank a right to proceed in the circuit court for Alexandria in the same manner as by the act of incorporation, it might proceed in Virginia, yet that act does not affect the writ of error as given in the act of the 27th of February.

The motion is, therefore, overruled.

SPIERS *v.* WILLISON.

By the act of assembly of Virginia of 1758, no gift of a slave was valid, unless in writing and *recorded*; but parol evidence may be given of the existence of a deed of gift to show the nature of possession which accompanied the deed.

ERROR to the district court for the district of Kentucky, in an action of *detinue* for certain slaves.

The plaintiff below, Rebecca Willison, claimed title to the slaves under her grandmother, and at the trial offered parol proof that the grandmother, while Kentucky was a part of Virginia, had given them to her by a deed, which was lost. To this testimony the defendant below (the plaintiff in error) objected, and prayed the court to instruct the jury that the said deposition was not legal evidence in this cause; and that at the time this gift was supposed to be made, no gift of a slave in Virginia was valid unless made in writing, which writing was afterwards *reduced to record;* which motion was overruled by the court, and the defendant excepted.

P. B. Key, for the plaintiff in error, contended, that as there could be no valid gift of a slave but by deed in writing and recorded, no parol evidence could be given of the existence of such a deed and of its contents, unless it were first proved not only that the deed itself was
*399 *lost, but that it had been duly recorded, and the record also destroyed.

The next best evidence to the deed itself is the copy from the record, and unless the loss of this better evidence be proved, an inferior grade of evidence ought not to be admitted.

The court ought also to have instructed the jury that a parol gift of a slave in Virginia was not valid. 1 *Wash.* 139. *Turner* v. *Turner.*

Jones and *Harper*, contra.

It is not stated in the bill of exceptions that this was the whole evidence. It was good as far as it went. If there was evidence that the deed had been duly recorded, and that the record had been lost, it would have been complete evidence of a title. But it appears by the depositions that before the expiration of the time limited for the recording of the deed, the plaintiff and the slave removed from the state of Virginia to South Carolina. It was a good deed at that time, and vested a title in the plaintiff until the expiration of the time for recording. Before that time arrived, the plaintiff and slave were both out of the jurisdiction of the laws of Virginia.

But by the laws both of Virginia and South Carolina, possession for a certain time gives a good title. Evidence of the deed was evidence of the claim under which the plaintiff held the possession.

It was not necessary for the plaintiff to prove a special title, for possession alone was sufficient to support the action.

The prayer to instruct the jury that a parol gift was not valid, was a prayer for an abstract opinion, and in its terms not applicable to the case. The court merely refused to give the instruction. It might be because the question was put to the court in such a manner as not to connect it with the case; it might be that the court thought the question irrelevant.

Key, in reply. * 400

The fact of removal does not appear in the bill of exceptions, and we cannot seek for facts elsewhere.

March 14.

MARSHALL, Ch. J. The error assigned consists in both the *admission* and the *operation* of the testimony. So far as evidence of the existence of a deed went to show the nature of the possession which accompanied the deed, so far it was admissible; but it was not in itself evidence of any title in the plaintiff. There was no error, therefore, in admitting the testimony as to the deed.

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But in overruling the prayer to instruct the jury, "that at the time the gift was said to be made, no gift of a slave was valid unless made in writing, which writing was afterwards reduced to record," the court below is to be considered as having given an opinion that a parol gift was good. This court is, therefore, of opinion, that the court below erred in refusing to give the latter part of the instruction prayed by the defendant.

This court gives no opinion as to the validity of title acquired by possession.

Judgment reversed, and the cause remanded.

* 401 *RAMSAY *v.* LEE.

In Virginia, in 1784, no gift of a slave was valid, unless in writing and recorded, although possession accompanied thegift.

Quere, whether 5 years' possession is alone a good title to enable a plaintiff to recover in *detinue*?

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of *detinue* brought by Lee against Ramsay, for a slave named Frederick.

The material facts appearing by the bill of exceptions taken by the defendant below, were, that Lee claimed as trustee for Kennedy, under a deed from Wilson duly acknowledged and recorded, and dated the 1st of December, 1804. The question was whether, at the date of that deed, Wilson had a good title to the slave.

Mrs. Gordon being the owner of the slave, in 1784, made a verbal gift of him to the defendant Ramsay, who was then only eight years old, and possession accompanied the gift; the slave remained with the defendant and his mother, Mrs. Ramsay, in the family of Wilson, until the year 1790, when Mrs. Ramsay, (claiming the slave as residuary legatee under the will of Mrs. Gordon, under the idea that the parol gift to her son was void,) by deed of bargain and sale conveyed the slave to Wilson, in consideration of five shillings, "and divers other good causes." Wilson held possession of the slave under that deed until the year 1805, when the defendant took him away, and has ever since detained him. The defendant and his mother and the slave had continued to live in the family of Wilson from the year 1784 till the year 1805.

The court below, upon the plaintiff's motion, instruct-

ed the jury, "that if such a verbal gift was made to the defendant of the said slave, and such possession given to him as aforesaid, the gift is void in law, and opposes no bar to the recovery of the plaintiff."

The verdict and judgment in the court below being against the defendant, he brought his writ of error.

Youngs, for the plaintiff in error, * 402

Did not contend that the verbal gift of a slave could, under the laws of Virginia, give a good title, but that such a gift and five years' possession was a good title for a *defendant* in detinue, but not for a plaintiff, if his possession was wrongfully acquired. He contended that the defendant's title was confirmed by the operation of the act of assembly of Virginia, passed in 1787.

E. J. Lee, contra.

If five years' possession is a good title to Ramsay, fifteen years' possession must be a good title in Wilson; and his possession, being posterior to Ramsay's, must give him a better title.

The case of *Turner* v. *Turner*, 1 *Wash.* 139. is decisive that such a parol gift cannot be given in evidence.

Youngs, in reply.

The possession of Wilson, in order to create a title, must at all events have been adverse: but his possession was the possession of Ramsay. They all lived in the same family.

In the case of *Jourdan* v. *Murray*, 3 *Call*, 85. it is decided by the court of appeals in Virginia, that a parol gift of slaves prior to 1787, may be given in evidence to prove five years' possession, so as to bar the plaintiff's recovery.

MARSHALL, Ch. J. There is no question that five years' adverse possession, with or without right, gives a good title.

March 14.

MARSHALL, Ch. J. delivered the opinion of the court to the effect following:

The case is the same as that of *Willison* v. *Spiers*,

Ramsay v. Lee.

just decided, except that in this case the court below gave the *instruction which the court in Kentucky ought to have given.

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The opinion of the court was only that a parol-gift to the defendant, accompanied by possession, did not bar the plaintiff's right to recover.

This court gives no opinion as to the title acquired by the possession.

Judgment affirmed.

STEAD'S EXECUTORS *v.* COURSE.

A collector, selling land for taxes, must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted.

It is incumbent on the vendee to prove the authority to sell.

By the tax laws of Georgia, for 1790 and 1791, the collector was authorized to sell land only on the deficiency of personal estate; and then to sell only so much as was necessary to pay the taxes in arrear.

Under those laws the sale of a whole tract, when a small part would have been sufficient to pay the taxes, was void.

ERROR to the circuit court for the district of Georgia, as a court of equity.

Stead's executors brought their bill in equity against *Elizabeth Course*, the *widow*, and *Caroline Course*, the *infant daughter* of *Daniel Course*, *deceased*, to set aside, as fraudulent, a deed of land made by *Courvoisie*, a collector of taxes for Chatham county, to Daniel Course, and to charge the land for payment of a debt due from the late firm of *Rae & Somerville* to the complainants' testator, according to a former decree of the court. The bill charges the land as being still the estate of John Rae, deceased, formerly one of the partners in the firm of Rae & Somerville, and that all the joint funds were exhausted.

There was no appearance for the defendant *Caroline*; but the defendant *Elizabeth* appeared, and pleaded, that her late husband, Daniel Course, purchased the land fairly and *bona fide* at public sale from the tax-gatherer, for the sum of 552 dollars and 89 cents, without notice of any claim, title or interest of the complainants in the said land, if any they have. The plea avers that the consideration money was paid to the tax-gatherer; that

*he had a right to sell the land for default in payment of taxes; that the taxes were not paid at the time of sale, which was publicly made, after legal notice; that Daniel Course took immediate possession, and died seised thereof, and at his death it descended to his heirs, of whom the defendant Elizabeth is one. The deed exhibited was dated May 5th, 1792. Stead's Ex'rs v. Course.

The defendant Elizabeth also answered the bill, denying fraud, &c.

To the *plea* there was a replication, denying that the tax-gatherer had a right to sell the land; that the sale was publicly made after legal notice, and that Daniel Course was a fair and *bona fide* purchaser, for a valuable consideration, without notice; and averring that the pretended sale and conveyance were unfair, fraudulent and void.

On the 17th of May, 1805, the circuit court sustained the plea, and dismissed the bill with costs.

The evidence and facts stated in the record are as follows:

1. The advertisement of the sale, in these words:

"*Sale for Taxes.*

"Will be sold, on Saturday, the 5th day of May, at the court-house in the city of Savannah, between the hours of twelve and one, 450 acres of land, lying and being on Pipemaker's creek, county of Chatham. Also, part of the lot No. 6. Percival ward, together with the house thereon, seized for the payment of the taxes of 1790 and 1791.

"FRANCIS COURVOISIE,
"T. C. C. C."

2. The original grant from the province of Georgia to John Rae, dated November 2d, 1762, describing the land as follows: "All that tract of land, containing 450 acres, situate and being in the parish of Christ's Church, in our *province of Georgia, bounded on the northeast by the *river Savannah*, on the southeast by land of James Edward Powell, Esq. on the southwest by land of Isaac Young, and land of the said John Rae, and on the northwest by Pipemaker's creek." *405

3. A certificate of a return of taxable property belonging to the estate of Robert Rae, made by *Samuel*

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Hammond, Esq. for the year 1791, viz. Chatham county, 282 acres tide swamp on Hutchinson island; 450 acres pine barren, opposite the above, on Pipemaker's creek; Richmond and Franklin county, 1,400 acres oak and hiccory land; 56 negroes; one four-wheeled carriage.

4. The following letter from Hammond to the collector, viz.

"Sir,

"As you are compelling me to pay the taxes due by the estate of Robert Rae, deceased, for the years 1790 and 1791, and as I have no moneys in my hands of the estate, or able to raise the sum due out of my own resources, and the law allowing me the privilege of pointing to property of the estate, you are hereby noted to levy on 450 acres of land in Chatham county, laying and being on Pipemaker's creek.

"I am your obedient servant,

"SAMUEL HAMMOND.

"*F. Courvoisie, Tax Collector.*

"2d April, 1792."

There was also evidence that the land came by descent or devise from John Rae, the original grantee, to Robert Rae, whose widow (the mother of the defendant, Elizabeth Course) afterwards married Samuel Hammond.

It was also stated as a fact, that "the relationship between the wife of Daniel Course and the wife of Samuel Hammond, *appeared to the court* the only evidence
*406 from *which it could be inferred that Course participated in the fraud, or had a knowledge of it."

By the tax laws of Georgia for 1790 and 1791, tide swamps of the first quality are valued at 97 shillings per acre, second quality at 60 shillings, and third quality at 37 shillings; pine barrens adjoining tide swamps, and within three miles of tide water, at 15 shillings per acre; oak and hiccory lands of the first quality at 15 shillings per acre, second quality 7 shillings, third quality 4 shillings. The tax for 1790 was *ten* shillings, and for 1791 *six* shillings, on every hundred pounds' value of the lands. The taxes were to be paid by the 15th of December, and it was enacted, that "in case of default, the collector of the county where such defaulter shall happen,

shall immediately proceed against such defaulter by distress and sale of the goods and chattels, if any be found, otherwise on the land of such defaulter, or *so much thereof* as will pay the amount of the taxes due, with costs; and in all such cases to make title to purchasers of the property sold as aforesaid."

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The collectors were required to close their accounts by the 1st of March, and deliver the same to the treasurer, and after deducting two and a half *per cent.* on all such taxes as they shall receive, pay the remainder to the treasurer.

P. B. Key, for the plaintiffs in error.

1. The plea is substantially defective,

1st. In not averring a seisin in some person who was liable for taxes.

2d. In not averring that there was no personal property which might be distrained for the taxes, for it was only in default of personal property that the collector was authorized by law to sell the land; and,

3d. In not averring that Daniel Course had not notice of the complainants' claim before he paid the purchase money.

*A purchase consists of a number of separate acts, such as the agreement, the deed, the payment, &c. If, before the last act be done, he obtains notice, he gains no title in equity. Even if he has paid the money, but not received the deed at the time of notice, he is not a purchaser without notice. * 407

The same strictness is required in *pleading* in equity as at common law. A *plea* in equity must of itself constitute a complete defence. It can derive no aid from the answer. The answer cannot come into view until the plea be disposed of. If the plea be good, the answer is unnecessary; and in considering the validity of the plea, every allegation of the bill, not answered by the plea, is to be taken to be true. *Mitford*, 15. 177. 2 *Atk.* 630. *Story* v. *Windsor*.

2. But if these defects of the plea should be considered as cured by the replication, yet it appears upon the whole record that the facts of the plea are not true, and that the sale of the collector transferred no right in the land to Daniel Course.

1st. The sale and conveyance were fraudulent and void.

2d. The collector had no authority, under the circumstances of the case, to sell; and if he had authority, he has not executed it legally.

1. The sale was fraudulent. The circumstances indicating fraud are, that the lands were liable in equity to the debts of John Rae. That the taxes were not paid for 1790 and 1791, although there was personal estate enough in the hands of the representatives of Robert Rae, in whose occupation the lands were, to pay them. This appears by Hammond's return of property, in which he has returned 56 negroes as the property of Robert Rae. That notwithstanding his personal property was in his hands, Hammond, who had married Robert Rae's widow, the mother of the defendant Elizabeth Course, not only permitted the land to be sold for taxes, but requested it might be sold, and pointed out this very land as the object of sale. The advertisement described the land *by its least notorious * 408
appellation. It mentions neither the name of the owner of the land, nor the amount of taxes due. Hammond's son-in-law, the husband of the defendant, became the purchaser. There can be no doubt that he must have known the situation of the estate. He knew it was liable for the debts of John Rae. He knew that there was personal estate sufficient to pay the taxes. He knew that his father-in-law ought to have paid them; and he knew that he had directed the collector to sell the land. He knew the price which he gave for the land was far below its value; for the bill states it was sold in 1799 for 2,386 dollars, and the defendant, in her answer, says that it was then sold far below its value. He and his father-in-law and their wives were the representatives of Robert Rae, and were the only persons, except creditors, who were interested in the lands. These circumstances go strongly to show that the sale by the collector was only the means used to defeat the creditors of their just debts.

2. The collector had no authority to sell these lands for taxes.

1st. Because there was sufficient personal property, of which he had notice by the return of Hammond.

2d. Because he was not authorized in any case to sell

more land than was sufficient to pay the taxes. The price which Daniel Course gave at this pretended sale was 552 dollars; the same lands, in 1799, sold, under the decree of the court, for 2,386 dollars, which the defendant in her answer says was far below their value, and yet the utmost amount of taxes which could be claimed, even supposing that all the taxes for 1790 and 1791, due from the estate of Robert Rae, for property wherever situated in Georgia, could be charged upon this one tract of land, would not exceed 150 dollars; and if, as we contend, this tract is liable for its own taxes only, the amount could not exceed 10 or 12 dollars. All special authorities are to be *rigidly pursued* and *strictly construed. Cowp.* 26.

3d. Because the collector could not sell after the first of March in any year for taxes due in a preceding year. *The 15th of December was the time limited for the debtors to pay their taxes, and from that time till the 1st of March was allowed to the collector to enforce payment by distress and sale; and on that day he was bound to close his accounts, and pay over the moneys collected to the treasurer. Whether he had collected or not, he was bound to pay; and the law did not give him this summary remedy to indemnify himself for any taxes he might advance. If it did, it must give him a lien for an indefinite time, which cannot be supposed to have been the intention of the legislature. It is a special power of an extrajudicial nature, to perform a duty in a certain time, and he is bound to pursue his authority strictly. If he paid the taxes which he had not collected, the power to distrain did not continue for his benefit. It is to be presumed that he did his duty, unless the contrary appears, and that he did pay the taxes which he was bound to collect, and had failed to collect, at the time when he was bound to close his accounts. * 409

4th. Because the advertisement did not sufficiently describe the land. It is simply called 450 acres of land lying on *Pipemaker's Creek*, without mentioning the *Savannah* river, on which it was also bounded, and which was a more notorious object. It neither mentions the person from whom the taxes were due, nor their amount, nor the name of the owner of the land. The advertise-

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ment has no date, nor is it stated what notice was given, nor how it was published.

There is no evidence of the amount of the taxes due, nor of the amount demanded; nor of the amount of taxes for the non-payment of which the land was sold.

It does not appear that *Courvoisie* was collector for the years 1790 and 1791.

Martin, contra.

The purchaser from a collector of taxes has a good title without deed. Upon the payment of the purchase-money, the title vests by operation of law, in the same
* 410 *manner as it does in the case of a sale of lands under a *fieri facias*.

There is no fact stated in the bill to show the sale to be fraudulent. No advertisement is required by law in the proceedings of the collector. There is no replication to the answer, and, therefore, all the facts it contains are to be taken to be true, so far as it is responsive to the bill.

It was not necessary to state in the plea that any person was seised of the land, nor who was liable for the taxes. The *property* was liable for taxes whoever might be its owner.

When sales are made by a public officer, he is presumed to do his duty, and to have complied with all the requisites of the law, until the contrary is proved. Every presumption is in favour of the purchaser. The purchaser is not bound to know whether the taxes have been paid or not.

There is no evidence that there was personal property at the time the taxes were payable. The certificate of Hammond was a year preceding that time; and the personal property might have been sold; but if there was, the purchaser of the real estate is not to be prejudiced thereby; it is a matter between the person liable for taxes and the officer who sold the land when he might have sold the personal estate.

If an executor have power by will to sell land for payment of debts, in case of a deficiency of personal assets, and he sells, although the personal assets were sufficient, yet the purchaser of the land will be protected. 1 *Eq. Ca. Abr.* 358, 359. 2 *P. Wms.* 148. 2 *Cha. Ca.* 115.

The collector had a right to sell this land to pay *all* the taxes due from Robert Rae's estate wherever situated; and it is immaterial at what price Daniel Course purchased the land, if the sale was fairly made. Stead's Ex'rs, v. Course.

*Hammond was not bound to pay the taxes on this land, if he knew that it was liable to the claim of the complainants. It would have been a waste of the estate of Robert Rae. *411

The imperfect description of the land is no evidence of fraud in the collector; he advertised it by the name stated in the return of Hammond. He was not obliged to describe it as lying on the Savannah. The law did not require him to name the person who had title to, or was in possession of, the land, nor the name of the *person* liable for the taxes, nor their amount. There is no proof of fraud but what arises from those circumstances, and the relationship between Mrs. Hammond and Mrs. Course; and these are only circumstances which at most may excite a suspicion. The presumption of law is always against fraud. It must always be proved. And unless it be not only *proved*, but brought home to the purchaser, the sale cannot be set aside.

P. B. Key, in reply.

The plea admits every thing in the bill not denied by the plea, and although there be also an answer, and no replication to that answer, yet the facts stated in the answer cannot be brought in aid of the plea. It must stand on its own foundation.

The answer cannot be brought into view until the question upon the plea be decided.

It was not necessary for the bill to state all the facts which may be given in evidence of fraud. It is sufficient if fraud be positively charged in general terms.

The rule of law is not that every thing is to be presumed in favour of the purchaser; but that a purchaser who claims title under a special limited authority, a *power* naked and without interest, must show that the power has been strictly pursued.

The doctrine advanced on the other side, that whether the taxes were due or not, the purchaser is protected in his title, is hazardous in the extreme; it *would subject all our estates to the control of a collector of taxes. *412

The cases cited do not support the doctrine. They

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only show that, where lands are devised for the payment of debts *generally*, the purchaser is not bound to see to the application of the money; or to inquire whether there be personal estate sufficient to pay the debts; but if lands are devised to pay *certain* debts *specified in a schedule*, there the purchaser must see to the application of the money. The case cited from 2 *P. Wms.* 148. was a case of a term for years only, which the executor had a right to sell as personal estate.

The sound rule of law is, that no man shall be permitted to sell the estate of another without an express delegated authority; and he who claims under such an authority must show that it has been strictly pursued. *Caveat emptor*, when he buys property from a man who is not the owner of it.

Property in one county could not be liable for taxes on property in another county. There were different collectors in different counties, who had separate and independent powers.

March 14.

MARSHALL, Ch. J. delivered the opinion of the court, as follows:

The plaintiffs, who were the creditors of Rae & Somerville, brought this bill to subject a tract of land in the possession of the defendants to the payment of a debt for which they had obtained a decree against Rae & Somerville.

The defendants plead that Daniel Course, under whom they claim by descent, is a fair purchaser, for a valuable consideration, of the premises in question, at a sale thereof, by the collector of taxes for the county in which they lie, made for taxes in arrear. The defendant also answered, denying fraud.

* 413 *A replication was filed to this plea, and, on a hearing, it was sustained, and the bill dismissed.

In this case the merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded.

On the first point, the counsel for the plaintiff has adduced authority which would certainly apply strongly, if not conclusively, in his favour, if a special demur-

rer had been filed to the plea. But as issue has been taken on it, the court thinks it sufficient, since it contains, in substance, matter which, if true, would bar the action.

The replication puts the matter of the plea in issue, and it is incumbent on the defendants to support it. They prove a sale by the collector on account of taxes, and adduce a deed conveying the premises to the purchaser. But this testimony alone is not sufficient to support the plea. The validity of the sale is the subject of controversy, and its validity depends on the authority of the collector to sell, and on the fairness of the transaction. It would be going too far to say that a collector selling land with or without authority, could, by his conveyance, transfer the title of the rightful proprietor. He must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted. It is true that full evidence of every minute circumstance ought not, especially at a distant day, to be required. From the establishment of some facts, it is possible that others may be presumed, and less than positive testimony may etsablish facts. In this case, as in all others depending on testimony, a sound discretion, regulated by the law of evidence, will be exercised. But it is incumbent on the vendee to prove the authority to sell, and the question respecting the fairness of the sale will then stand on the same principles with any other transaction in which fraud is charged.

*In examining the law under which this sale was made, the court perceives that the collector is authorized to sell land only on the deficiency of personal estate, and then to sell only so much as is necessary to pay the tax in arrear. In this case a sale is made of a whole tract of land, without specifying the amount of taxes actually due for which that land was liable and could be sold. This is proceeding in a manner not strictly regular. The sale ought to have been of so much of the land as would satisfy the tax in arrear. Should it be true that the land was actually liable for the whole sum for which it sold, it would still be incumbent on the vendee to prove that fact; for it cannot be presumed. Every presumption, arising from the testimony in the cause, is against it. *414

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Had this fact been established, the court is inclined to think that the circumstances of the case as stated, though not perhaps amounting to proof of fraud, afford such presumptions as would render a final decree, without further testimony, unsatisfactory, and that an issue ought to have been directed on the question whether the sale was fraudulent or not. But if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority, and the plea cannot be sustained.

It is, therefore, the opinion of the court, that there is error in the decree of the circuit court for the district of Georgia, in sustaining the plea of the defendants, and dismissing the bill of the plaintiffs, and that the said decree ought to be reversed and annulled, and the cause remanded, with directions that the defendants shall answer over, and that further proceedings be had in the said cause, according to equity.

Decree reversed.

*HIGGINSON *v.* MEIN.

The act of Georgia confiscating the estate of the mortgagor, is no bar to the claim of the mortgagee, a British merchant, whose debt was only sequestered during the war. The estate of the mortgagor only was confiscated, not that of the mortgagee.

The act of limitations of Georgia does not apply to mortgagees.

The possession of the mortgagor is not adverse.

Quære, whether a presumption of payment of the debt does not arise from the circumstances of this case?

THIS was an appeal from a decree of the circuit court for the district of Georgia, which dismissed the complainant's bill brought to foreclose a mortgage.

The facts, as stated by *Marshall*, Ch. J. in delivering the opinion of the court, were as follows:

In November, 1769, Alexander Wylly, then residing in Georgia, executed his bond to Greenwood Higginson, merchants of London, for the sum of 2,108*l.* 4*s.* sterling, conditioned to pay 1,054*l.* 2*s.* like money, on or before the 1st of January, 1773; and also executed a deed of mortgage, (which was admitted to record in the secretary's office,) to secure the payment of the bond. Alexander Wylly took part with the British in the war of our revolution, in consequence of which his estate was confiscated, and commissioners

were appointed to take possession of it and to sell it. In 1784, the mortgaged premises were sold and conveyed by the commissioners to certain persons in Savannah, who sold and conveyed them to James Houston, who retained peaceable possession of them until his death. In 1796 these lands were sold under execution by the marshal, to satisfy a judgment obtained against James Mossman, as executor of James Houston. The purchaser at the marshal's sale had notice of the mortgage deed to Greenwood & Higginson.

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This suit is brought against the agent of the purchaser, (to whom notice was given, and to whom the purchaser has since conveyed his right,) in order to obtain payment of the debt due from Wylly, and to foreclose all equity of redemption in the mortgaged premises. The bill was filed on the 4th of November, 1802.

P. B. Key, for the appellant. * 416

The treaty of peace of 1783 removed all legal impediments to the recovery of debts. By the fourth article, "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all *bona fide* debts heretofore contracted." And by the 5th article, "It is agreed that all persons who have any interest in confiscated lands, either *by debts*, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." At the time of the treaty, this land was not sold, but holden by the state under the confiscation act. After the treaty the state held it subject to the mortgage, and could sell only such right as it had. It could at most sell Wylly's right of redemption.

Harper, contra.

The estate both of the mortgagor and mortgagees in this land was confiscated, and vested in the state of Georgia. If the treaty is to set up the title, no estate of a British subject indebted to a British subject could ever be confiscated; for the land may be the only fund out of which the creditor can get payment.

The impediments intended to be removed by the treaty were only *legal* impediments, not every thing which went to impair the *security*; not that which mere-

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ly rendered the debtor less able to pay. Confiscations were not included under the expression legal impediments, because there is a separate provision for the case of confiscations. If confiscations were meant to be included in the expression, it might as well be extended to any general acts of the legislature by which the debtor's means of payment may be diminished. This being a particular lien, does not differ the case from that of a general lien. Every judgment creditor had a lien upon all the lands of his debtor, and if all these liens are saved by the treaty, there were very few confiscations which it would not annul.

*417 *The fifth article of the treaty extends no further than the fourth.

MARSHALL, Ch. J. The decisions of this court have been uniform, that the acts of the states, confiscating debts, are repealed by the treaty; and if, in this case, the debt remains, does not the security remain also? Is not the remedy as much protected by the treaty as the debt itself?

Harper. We contend not.

The lapse of 30 years induces a presumption that the bond is satisfied. We do not rely upon the statute of limitations, but the general presumption. In England, it is decided that the presumption arises by the lapse of 20 years without a demand or payment of interest.

MARSHALL, Ch. J. The period of 20 years is fixed upon in case of a bond, because in that time the interest at five *per cent.* equals the principal; and no further interest is covered by the penalty of the bond.

Harper. That is not the reason stated in the English books.

But the reason is, that a man is presumed to depend upon the interest of his money as a revenue.

The fact of the plaintiff's being beyond seas does not remove the presumption, because both parties were equally beyond seas, and probably both within one jurisdiction.

P. B. Key, in reply.

The fifth article of the treaty expressly provides for the case. How can a man have an interest, *by debt*, in confiscated lands, unless it be by mortgage, or other lien. The practice in Maryland has always been to protect such liens.

LIVINGSTON, J. I have never heard that confiscated property has been restored by force of the treaty. The *treaty only provides that congress shall *recommend* such restitution. * 418

Key. Debts due to British subjects were not *confiscated* by the act of Georgia. They were only *sequestered*.

March 14.

MARSHALL, Ch. J. after stating the facts of the case, delivered the opinion of the court, as follows:

It is contended, on the part of the purchaser,

1st. That the lands are exonerated from the mortgage by the confiscation and sale thereof made by the state of Georgia.

2d. That they are exonerated by the length of time which has intervened since that confiscation and sale, during which an adverse possession has been held.

3d. That payment of the mortgage is to be presumed.

Several acts of confiscation were passed during the war by the state of Georgia, in which the name of Alexander Wylly is to be found. That under which the defendants in this case claim, was made in the month of May, in the year 1782. That act contains also a clause confiscating generally the estates of British subjects, with the exception of debts due to merchants residing in Great Britain, which were sequestered. The debt due to Greenwood & Higginson came within this exception, and the majority of the court is of opinion, that the lien given by the mortgage on the land of Wylly, for the security of that debt, was not confiscated.

The estate of Wylly, not the interest of Greenwood & Higginson in that estate, being confiscated, it is not to be inferred that the lien of Greenwood & Higginson

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on that estate was discharged. The treaty of peace *was made while the estate remained unsold. The fifth article of the treaty, after discovering much solicitude on the part of Great Britain for the entire restoration of confiscated estates, concludes with this clause: "And it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

This article applies to those cases where an actual confiscation has taken place, and stipulates expressly, that in such cases the interest of all persons having a lien upon such lands shall be preserved. Neither the confiscation, nor any act in consequence of the confiscation, can constitute a legal impediment to the prosecution of their just rights. The preceding part of the article had contemplated sales of the confiscated property, and, consequently, this clause must have been intended to charge the lands, even in the hands of a purchaser. But respecting its application to this particular case, the court cannot conceive a doubt. The lands, at the time of the treaty, remained unsold, and the government claiming them as confiscated, stipulates through the proper constituted authorities for their liability to this mortgage. If, then, the act of confiscation, independent of the treaty, would be construed to destroy the claim of the mortgagee, the treaty reinstates the lien in its full force, and the subsequent sale of the property could only pass it with the burden imposed upon it.

2d. Is this remedy barred by the act of limitations?

Upon an attentive consideration of that act, it appears to be intended for suits at law, claiming the lands themselves, not to suits in equity for the purpose of subjecting the lands to the payment of debts for which they are mortgaged. The words of the law would lead to that opinion, and it is confirmed by the consideration that, in such cases, the possession of the mortgagor, or those claiming under him, is not adverse to, but is compatible with, the rights of the mortgagee. Unless, therefore, this statute has been otherwise construed *in Georgia, it would not be considered as applicable to such a case as this. But this point must be decided in favour of the plaintiffs, because there is a saving in the act of the rights of persons beyond sea,

*420

3. Is payment in this case to be presumed?

The length of time which elapsed between the day when this bond and mortgage became payable, and that on which the suit was instituted, is certainly sufficient to warrant a presumption of payment. But this presumption may be met by circumstances which account for the delay in bringing this suit. In this case, the war, and those events which succeeded the war, have not the same influence as in ordinary cases of British debts, because the debtor was within the reach of his creditor from the date of his banishment, in the year 1778, and might have been sued. It does not sufficiently appear in the proceedings where he was, nor what was his situation, to enable the court to judge whether the long delay in bringing this suit is or is not sufficiently accounted for. Neither is it shown satisfactorily that Alexander Wylly has left no personal representative who might show payment of this debt. If there be a personal representative of Alexander Wylly in existence, such person ought to be a party to this suit; if there be no personal representative, some evidence that there is none ought to be adduced. In any event, under all the circumstances of this case, enough does not appear to enable the court to decide whether payment ought to be presumed, or whether the delay in instituting this suit can be accounted for, and the court is, therefore, of opinion that an issue ought to have been directed by the circuit court, for the purpose of ascertaining the fact of payment. The decree of the circuit court is, therefore, to be reversed, and the cause remanded to that court, with instructions to direct an issue to determine whether the bond in the bill mentioned has been paid, and with liberty to the plaintiff to amend his bill, and make new parties, if he shall desire it.

Livingston, J. dissented from this opinion, but did not state his reasons.

*POLLARD AND PICKETT *v.* DWIGHT ET AL.

The appearance of the defendants to a foreign attachment in a circuit court of the United States, waives all objection to the non-service of process.

The district judge may alone hold a circuit court, although there be no judge of the supreme court allotted to that circuit.

An action may be supported on a covenant of *seisin*, altho' the plaintiff has never been evicted; and the declaration need not aver an eviction.

Under the foreign attachment law of Connecticut, an absent person, who is liable for damages for breach of his covenant, is an *absent* DEBTOR.

ERROR to the circuit court for the district of Connecticut.

Dwight and others brought a foreign attachment against Pollard and Pickett, in the county court of Hartford, and declared in an action of covenant upon a deed of bargain and sale, in fee-simple, of certain lands in the county of *Wythe*, and commonwealth of Virginia, by which the defendants below covenanted that they were "lawfully seised of the lands and premises, with their appurtenances, and had good right and lawful authority to sell and convey the same, in manner and form aforesaid;" and the breach assigned was, "that they were not, nor were any or either of them, lawfully seised and possessed of any estate whatever in the said land and premises, nor in any part thereof, nor had the said Pollard and Pickett, or either of them, good right and lawful authority to sell and convey the said land and premises as aforesaid."

The defendants appeared, and removed the cause to the circuit court of the United States for the district of Connecticut, and there pleaded to the jurisdiction of the court, and prayed "judgment whether the honourable Pierpont Edwards, district judge of the district of Connecticut holding said court, there being no justice of the supreme court of the United States present in court, will have cognisance of the said cause, because, they say that, by the law of the United States, the circuit court of the second circuit in the district of Connecticut, shall consist of the justice of the supreme court residing in the third circuit, and the district judge of the district of Connecticut; and that when the said law was enacted, viz. on the 3d of March, 1803, the honourable William Paterson

The official certificate of survey returned by a legal sworn surveyor in Virginia, cannot be invalidated by a particular fact, tending to show an impossibility that the survey could have been made in the time intervening between the date of the entry and the date of the certificate of survey. On the trial of an action in Connecticut for breach a covenant of seisin of lands in Virginia, the question whether a patent from the state of Virginia for the lands, be voidable, is not examinable.

Parol testimony is not admissible, in an action on the covenant of seisin, to prove prior claims upon the land.

was the only justice of the supreme court residing in the said third circuit, and that he died on or about the 10th of September last past, *and that there is not now, nor hath there been, since the death of the said Paterson, any justice of the supreme court residing in the said third circuit; and there hath not been by the supreme court of the United States, or by the President of the United States, any allotment of a chief justice, or an associate justice of the supreme court of the United States, to the said second circuit, and this they are ready to verify," &c.; which plea, upon general demurrer, was overruled, and a *respondeas ouster* awarded: whereupon the defendants pleaded that they were, at the date of the deed, "well seised and possessed of the said land, and had good right to bargain and sell the same, in manner as is alleged in the said deed, and so they have kept and performed their said covenants, and of this put themselves on the country;" "and the plaintiffs likewise."

* 422

The verdict was for the plaintiffs, and damages assessed to 27,497 dollars. The defendants moved in arrest of judgment, because it appears, by the declaration, that the said deed was executed, and the lands lie in the state of Virginia; and because the declaration is insufficient, and will not support any judgment; but the motion was overruled, and judgment rendered on the verdict.

On the trial, a bill of exceptions was taken, which stated that the defendants claimed to be seised under a patent to them from the Governor of Virginia, dated March 20, 1795, and grounded on a survey in favour of David Patterson, by virtue of an entry, dated September 1, 1794, on sundry treasury warrants, to the amount of 150,000 acres, and completed on the 8th day of September, 1794, which survey had been assigned to the defendant, Pollard; whereupon the plaintiffs offered to read in evidence *copies* of two surveys made for one Wilson Carey Nicholas, by virtue of two entries made on the same 1st of September, 1794, in the office of the same surveyor, one to the amount of 500,000 acres, and the other to the amount of 480,000 acres, the greater part of which laid in the county of Wythe, and bounding on the land surveyed for Patterson; and that the said survey for 500,000 acres purported to be completed

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on the 9th of September, 1794, and that for 480,000 on the 10th of the same month, and that the extent of all the lines of the said surveys was more than 320 miles; and offered to prove by Erastus Granger, that the nearest part of the said lands to the office of the surveyor of Wythe county, was distant therefrom two days' journey; and that a surveyor could not, in that county, survey a line longer than seven miles in a day; and that he (Erastus Granger) had surveyed the land surveyed for Patterson, and found marked trees only for about three or four miles from the starting point of the survey, and two or three only of the first corners mentioned in the survey, and that the streams ran in opposite directions to those laid down in the plot; which testimony of the said Granger was offered to prove that Patterson's survey was fraudulent, and not made conformably to the laws of Virginia; and the plaintiffs further offered to prove, by the testimony of the said Granger, that there were *prior claims* upon the land in question to the amount of upwards of 90,000 acres. It was admitted that Granger was not a sworn surveyor. The defendants objected to the above evidence, but the court overruled the objection, and suffered it to go to the jury.

The defendants sued out their writ of error to this court, and the errors assigned were,

1. That the plea to the jurisdiction ought to have been allowed.

2. That the evidence stated in the bill of exceptions ought not to have been admitted.

3. That the declaration is insufficient.

4. That the title of the land could not be tried in Connecticut.

5. That the circuit court had not jurisdiction, the plaintiffs being citizens of Massachusetts and Connecticut, and the defendants citizens of Virginia, not found in the district of Connecticut.

* 424 *6. That the judgment ought to have been rendered for the defendants.

C. Lee, for the plaintiffs in error.

This is a prosecution against an absentee for breach of covenant.

The act of Connecticut only authorizes such process against a *debtor*, not against a man who may be liable for

unliquidated damages on a breach of covenant. The words of the *Connecticut law*, *fol.* 35. are, "absent or absconding *debtors*," and the defendants are so called in the declaration. It could never be the intention of the legislature of Connecticut to try the title to land in Virginia by the process of foreign attachment in Connecticut.

Two questions arise in this cause.

1. Whether the circuit court had jurisdiction; and,

2. Whether the evidence stated in the bill of exceptions was admissible.

1. The law is the same in this case on the point of jurisdiction, as if the suit had been originally commenced in the circuit court. *Laws U. S.* vol. 1. p. 56. s. 12. and by the 11th section of the same act, the circuit court has no jurisdiction but over inhabitants of the state, or over persons found therein and served with process. Vol. 1. p. 55. Process by attachment on effects of persons not inhabitants, cannot be maintained in the circuit courts of the United States. 2 *Dall.* 396. *Hollingsworth* v. *Adams.*

A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort. *Capron* v. *Van Noorden*, (*ante*, vol. 2. p. 126.) *Beecher's Case*, 8 *Co.* 59. *Bernard* v. *Bernard*, 1 *Lev.* 289. And in the case of *Diggs and Keith* v. *Wolcott*, in this court, at last term, (*ante*, p. 179.) the appellants had removed the cause from the state court to the circuit court, who decreed against them, and on their appeal to this court *the decree was reversed for want of jurisdiction in the circuit court. * 425

Where the court has a limited jurisdiction, the facts which bring the case within that jurisdiction must appear on the record. 9 *Mod.* 95. 3 *Dall.* 382. *Bingham* v. *Cabot.* 2 *Cranch*, *Wood* v. *Wagnon.*

Upon the demurrer to the plea to the jurisdiction, the whole record is open to examination; and the defendant may avail himself of every substantial objection to the declaration, or to the writ, as it is made a part of the record. The declaration itself shows that the lands which are the subject of the covenant are in the state of Virginia; that the deed was there executed; and that the title of those lands is drawn in question. It appears, then, upon the face of the declaration, that the action is local, and can be tried only in

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Virginia. The declaration also states Pollard and Pickett to be "of the county of Henrico and state of Virginia," and that they are "absent and absconding debtors;" and, therefore, the circuit court was excluded from the cognisance of the case by the 11th section of the *judiciary act of* 1789, vol. 1. p. 55.

The declaration is also defective in not averring an eviction, or a better title out of the plaintiffs in error. 1 *Williams's Massachusetts Reports*, 464. *Emerson* v. *Proprietors of Minot*, 4 *T. R.* 620.

But the plea in abatement ought to have been allowed. The act of congress of March 3, 1803, (vol. 6. p. 315.) enacts, "that the circuit court of the second circuit shall *consist* of the justice of the supreme court residing within the third circuit, and the district judge of the district where such court shall be holden;" and by the act of 29th of April, 1802, vol. 6. p. 88. it is "provided, that when only one of the judges, hereby directed to hold the circuit courts, shall attend, such court may be held by the judge so attending." The 5th section of the same act provides for the *allotment* of the judges among the circuits, in case of a new appointment of a judge; but makes no provision in case of a *vacancy*.

* 426 *There can be no circuit court in the second circuit, unless there be a justice of the supreme court allotted to that circuit. If the circuit court is to consist of a particular justice of the supreme court, and a district judge, it cannot exist without such a justice of the supreme court. A *whole* consists of all its parts. If any part be wanting it is not a *whole*. A *session* of the court may be holden by one judge, but the court must be in existence.

Whenever there are not two judges of the court in existence, its functions are suspended.

2. As to the bill of exceptions.

The papers said to be copies of surveys for Nicholas, ought not to have been admitted in evidence. Nicholas was no party to this suit, and even if there had been evidence that such surveys were ever made, and that these were true copies, they could not be evidence in this cause.

The testimony of Erastus Granger was inadmissible. He was allowed to testify that he had surveyed the land, and that there were prior claims upon it to the

amount of 80,000 acres. If he ever made such survey, it was *ex parte*, and as the agent of the appellees. *Ex parte* surveys are inadmissible evidence as to boundaries. 2 *Lord Raym.* 734. *Bridgemore* v. *Jennings.* Poll and v. Dwight.

Illegal or improper evidence, however unimportant or irrelevant, should not be confided to a jury, because it may mislead them. 2 *Wash.* 281. *Lee* v. *Tapscott.*

Parol testimony is incompetent to invalidate a title to lands in Virginia, which is to be decided according to the laws of that state.

Unless the prior claims were founded upon deeds or writings, they could not be set up against a patent from the state; and if they were founded upon deeds or writings, they ought to be produced.

No lands in Virginia can pass or be conveyed but by deed in writing, acknowledged or proved, and recorded.

* 427 **Martin*, on the same side, in support of the objection that the declaration did not aver an eviction, cited 1 *Mod.* 292. 1 *Saund.* 58. 3 *Wentworth*, 440. 2 *Mod. Intrandi*, 206, 207. 1 *Harris's Entries*, 526. 531.

Harper, contra.

According to the decisions of the courts in Connecticut, a foreign attachment will lie for damages on a breach of covenant. The distinction is only taken between debts and torts. What is not a tort is a debt, within the meaning of their act of assembly. 2 *Swift*, 177.

According to the mode of surveying lands in Virginia, by the 23d section of their land law, it is impossible to execute the surveys in the time which intervened between the dates of the entry and of the survey. The evidence offered was to show that the survey was fraudulent. It was to show that surveys, said to be made in eight days, could not have been made in eight weeks.

The bill of exceptions states the papers to be *copies* of the surveys, and, *ex vi termini*, a copy means a true copy; for if it be not a true copy, it is no copy. The objection was not that they were not copies, but that copies of such papers were not admissible evidence.

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The testimony of Granger was to show that the land was included in prior surveys. It was a necessary link in the chain of proof to show title out of the plaintiffs in error.

It was not necessary to aver or to prove an eviction. The case in *Williams's Reports* is upon a covenant to *warrant;* which is, in effect, a covenant for quiet enjoyment. So was the case in 1 *Mod.* 292. In the case from *Saunders*, the covenant was that he was *seised.* It is true that proof of eviction is one mode of showing a want of title, but it is not the only mode. In *Horsford* v. *Aggard*, *Kirby's Rep.* 3. it is decided that eviction is not necessary to recover on a covenant of seisin. If the plaintiff can show that the defendant had a defective *title, it is sufficient. What use would there be in a covenant of seisin, in addition to the covenant of warranty, if the former requires the same evidence as the latter?

*428

Martin, in reply.

If the papers offered were copies, it does not appear that the originals could not be had.

After Pollard and Pickett had produced a grant under the state of Virginia, the plaintiffs below must have shown a better title in some other person, (*Cro. Jac.* 304. *Salman* v. *Bugshaw.*) but they only attempted to prove irregularity in the survey.

The patent gave a good title, even if there had been no survey. The surveyor himself could not have been permitted to contradict his certificate. It does not appear how long the surveyor was employed in making the survey. It could only bear date on *one* day, and whether that was the day on which he began or finished it, does not appear. It is no evidence of fraud.

Mr. *Martin* declined arguing the points respecting the jurisdiction, and the form of the declaration, as the court seemed strongly inclined against him; but he thought it a fatal objection to the declaration that it did not aver an eviction; and that the action was local, and not transitory.

March 15.

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MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

In this case objections have been made to the jurisdiction of the circuit court, and to the proceedings in that court.

The point of jurisdiction made by the plaintiffs in error is considered as free from all doubt. By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which *they would have stood, had process been served upon * 429
them, and, consequently, waived all objections to the non-service of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the state court in which it was instituted, and this court would be bound now to direct that proceeding. As little foundation is there for the exception taken to the manner in which the circuit court was constituted. That court consists of two judges, any one of whom is capable of performing judicial duties. So this court consists of seven judges, any four of whom may act. It has never been supposed that the death of three of the judges would disqualify the remaining four from discharging their official duties until the vacant seats of their departed brethren should be filled. There is nothing in the peculiar phraseology of that part of the judicial act which establishes the circuit courts, that requires a different construction of the words authorizing a single judge to hold those courts, from what is usually given in other cases, to clauses authorizing a specified number of justices to constitute a court.

The exceptions taken to the proceedings of the circuit court are more serious. These are,

1. To the pleadings.

2. To the opinions of that court, admitting certain testimony in support of the action.

The objections to the pleadings are,

That the different parts of the declaration are repugnant to each other; and that the declaration is itself insufficient, as the foundation of a judgment.

In deciding on so much of this objection as depends on the laws of Connecticut, this court would certainly be guided by the construction given by that state to its

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own statute; and, if it was indispensably necessary now to decide that question, the evidence in favour of the construction maintained by the defendants in error would seem to preponderate.

*430 *Another objection taken to the declaration is, that it ought to have alleged a disseisin of the plaintiffs below, in order to enable them to maintain their action.

On this part of the case, the court can only consider whether the declaration in itself, unconnected with the testimony which was adduced to support it, is so radically defective, that a judgment cannot be rendered on it. This leads to the inquiry, whether the covenant of the vendors can be broken, as stated in the declaration, although no eviction has taken place; and the court is of opinion that it may be so broken. 9 *Co.* 60.

The covenant is, that the vendor is seised in fee of the premises which he sells and conveys. Suppose the fact to be that he had no title, nor pretence of title, to those premises; that he had conveyed lands for which he had never received a patent or a title of any kind. Could it be said that his covenant that he was seised in fee remained unbroken until the real proprietor should think proper to eject the vendee? This question, in the opinion of the court, must be answered in the negative. The testimony which would be sufficient to establish the breach assigned, may be a subject for serious consideration, but on the sufficiency of the breach, as assigned to support a judgment, there is no doubt.

The exceptions to the testimony admitted in the circuit court consists of two parts.

1st. To the admission of certain copies of surveys made for Wilson Carey Nicholas, connected with the testimony of Erastus Granger, describing the face of the country on which the surveys purported to be made.

2d. To the admission of parol testimony to prove prior titles to the lands conveyed in the deed on which this suit was instituted.

1. The surveys of Wilson Carey Nicholas, and the explanatory testimony of Granger, were introduced for the purpose of showing that the patent for the lands sold by Pollard & Pickett was void, because it issued on a *431 *plat representing a survey which, in point of fact, could not have been made.

In examining this exception, it becomes proper to inquire what was the real issue between the parties.

The plaintiffs below averred in their declaration, that the defendants were not seised and possessed of any estate whatever in the land and premises, nor in any part thereof, nor had they or either of them good right and lawful authority to sell and convey the same. The defendants, in their plea, do not set forth their title, but say, generally, that they were seised of the land sold and conveyed by them, and had good right to sell and convey the same, as is expressed by their deed. On this plea an issue is tendered, which is joined by the plaintiffs.

To prove that the survey on which the patent granting the lands to the defendants was issued could not have been made, the plaintiffs produced two other surveys made by the same person for Wilson Carey Nicholas, which were said to be completed only two days succeeding the completion of the survey of the defendants, which three several surveys could not possibly have been made in the time intervening between the entries in the surveyor's office and the day on which they are alleged to have been completed, whence the jury might conclude that the survey of Pollard & Pickett was not made.

The surveyor was a sworn officer, and his survey was returned upon oath. This is an attempt to invalidate the evidence derived from his official return, by a particular fact which has no relation to the cause before the court, and with which the parties to this controversy have no connection. Had it even appeared that the copies offered in evidence were authenticated, they would, on this account, have been inadmissible.

This whole testimony is inadmissible on other ground. Were it even true that this patent is voidable, if the surveyor had not run round all the lines of the land, a *point not yet established, it cannot be deemed absolutely void; it cannot be deemed a mere nullity. While it remains in force it is a valid title, and vests the fee-simple estate in the patentee. In this action, and on the trial of this issue, the question whether the patent be voidable by Virginia or not, is not properly examinable. Testimony, therefore, tending to establish that point, is irrelevant and inadmissible. * 432

2. But had the court entertained any doubt on this

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point, the second part of the exception would be clearly decisive with regard to this judgment.

Parol testimony is admitted to show prior claims to the land in controversy. The defendants in error attempt to defend the admission of this testimony, by supposing it auxiliary to other testimony which had previously established the validity of those claims, and that this witness was only adduced to show that those claims covered this land. Had the fact supported the argument, a private *ex parte* survey would have been a very improper mode of establishing it; but the language of the exception excludes that construction of the opinion which the counsel for the defendants in error would put upon it. The proof offered and admitted is, not that those particular titles which were exhibited and proved to the court covered the land conveyed by Pollard & Pickett, but "that there were prior claims upon it to the amount of upwards of ninety thousand acres." The prior claims rest upon the oath of the witness. If those claims were valid, their validity was established by his testimony, which cannot be tolerated on any legal principle; if they were mere claims, not good titles, they ought not to have been stated to the jury. They were irrelevant to the point in issue.

Upon the whole, the court is unanimously of opinion, that the circuit court erred in permitting the copies of surveys made for Wilson Carey Nicholas, and the testimony of Erastus Granger, to go to the jury for the pur-

* 433 poses mentioned in the bill of exceptions, and *that the judgment of the circuit court must, on that account, be reversed, and the cause remanded for a new trial.(a)

Judgment reversed.

(a) After the opinion of the court was delivered, *Lee* prayed that the cause might be remanded, *with leave for the defendants below to amend their pleadings.*

The Court said, that the court below had the power to grant leave to amend, and this court could not doubt but it would do what was right in that respect.

EX PARTE LEWIS AND OTHERS.

IN the circuit court for the district of Pennsylvania, at November term, 1806, a motion was made by *Rawle*, in behalf of *Lewis and others*, (the jurors in civil cases who had attended the court at that session,) that the marshal be ordered to pay each of the jurors one dollar and twenty-five cents for each day's attendance;

But the judges of that court being divided in opinion upon the question, it was certified to this court.

The jurors in civil cases, attending the circuit of the United States, for the Pennsylvania district, are entitled to one dollar and 25 cents each for each day's attendance.

This Court ordered it to be certified that the jurors were entitled to the fee of one dollar and twenty-five cents *per diem* for their attendance.

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ERROR to the circuit court of the district of Columbia, in an action on a policy of insurance on the cargo of the brig Fame, on a voyage from Alexandria, to, at, and from *Barbadoes* and four other ports in the West Indies, and back to Alexandria, the vessel and cargo warranted American property. The vessel arrived at Barbadoes, and sailed from thence for Antigua, but on her voyage to that island was captured by a British vessel and carried into Barbadoes, and there condemned in the viceadmiralty court, for attempting to break the blockade of *Martinique*.

The sentence of a foreign court of admiralty condemning a vessel *for breach of blockade*, is *conclusive* evidence of that fact in an action on the policy of insurance.

The jury found a special verdict, upon which the judgment below was in favour of the plaintiffs.

The only question arising upon this special verdict was, whether the sentence of the court of viceadmiralty was conclusive evidence of an attempt to violate the blockade of Martinique.

This question having been several times argued, (but not decided,) in the case of *Fitzsimmons* v. *The Newport Insurance Company*, at this term, (*ante*, p. 185.) the counsel submitted it to the court without further argument.

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March 15.

JOHNSON, J. The action below was instituted on a policy of insurance.

On behalf of the insurers, it was contended that the policy was forfeited by committing a breach of blockade. It is not, and cannot be made a question, that this is one of those acts which will exonerate the underwriters from their liability. The only point below was relative to the

* 435 evidence upon which the commission of *the act may be substantiated. A sentence of a British prize court in Barbadoes was given in evidence, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. It is the English doctrine, and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of belligerent rights, and authorizes capture. This doctrine is not denied, but the plaintiff contends that he did not commit such an attempt, and the court below permitted evidence to go to the jury to disprove the fact on which the condemnation professes to proceed.

On this point, I am of opinion that the court below erred.

I do not think it necessary to go through the mass of learning on this subject, which has so often been brought to the notice of this court, and particularly in the case of *Fitzsimmons*, argued at this term. Nearly the whole of it will be found very well summed up in the 18th chapter of Mr. Park's Treatise. The doctrine appears to me to rest upon three very obvious considerations; the propriety of leaving the cognisance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law, and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is coordinate throughout the world.

It is sometimes contended that this doctrine is novel, and that it takes its origin in an incorrect extension of the principle in *Hughes* v. *Cornelius*. I am induced to believe that it is coeval with the species of contract to which it is applied. Policies of insurance are known to have been brought into England from a country that acknowledged the civil law. This must have been the

law of policies at the time when they were considered as contracts proper for the admiralty jurisdiction, and were submitted to the court of policies established in the reign of Elizabeth. It is probable that, at the time when the common law assumed to itself exclusive jurisdiction of the contract of insurance, the rule was *too much blended with the law of policies to have been dispensed with, had it even been inconsistent with common law principles. But, in fact, the common law had sufficient precedent for this rule, in its own received principles relative to sentences of the civil law courts of England. It may be true that there are no cases upon this subject prior to that of *Hughes* v. *Cornelius*, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of *Hughes* v. *Cornelius*, the doctrine has frequently been brought to the notice of the courts of Great Britain in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions, but the existence of the rule, or its applicability to actions on policies, is nowhere controverted.

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I am of opinion that the sentence of condemnation was conclusive evidence of the commission of the offence for which the vessel was condemned, and as that offence was one which vitiated the policy, the defendants ought to have had a verdict.

WASHINGTON, J. The single question in this case is, whether the sentence of the admiralty court at Barbadoes, condemning the brig Fame and her cargo as prize, for an attempt to break the blockade of Martinique, is conclusive evidence against the insured, to falsify his warranty of neutrality, notwithstanding the fact stated in the sentence as the ground of condemnation is negatived by the jury?

This question has long been at rest in England. The established law upon this subject in the courts of that country is, that the sentence of a foreign court of competent jurisdiction condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted, di-

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rectly or collaterally, in any other court having concurrent jurisdiction.

This doctrine seems to result from the application of a legal principle which prevails in respect to domestic
* 437 *judgments, to the judgments and sentences of foreign courts.

It is a well established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, *upon the same matter* coming incidentally in question in another court for a different purpose. It is not only conclusive of the *right* which it establishes, but of *the fact* which it directly decides.

This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer. That irregularities have sometimes taken place, to the exclusion of a fair hearing of the parties, is not to be denied. But this furnishes no good reason against the adoption of a general rule. A spirit of comity has induced the courts of England to presume that foreign tribunals, whether of prize or municipal jurisdiction, will act fairly, and will decide according to the laws which ought to govern them; and public convenience seems to require that a question, which has once been fairly decided, should not be again litigated between the same parties, unless in a court of appellate jurisdiction.

The irregular and unjust decisions of the French courts of admiralty, of late years, have induced even English judges to doubt of the *wisdom* of the above doctrine in relation to foreign sentences, but which they have acknowledged to be too well established for English tribunals to shake; and the justice with which the

same *charge is made by all neutral nations against the English as well as against the French courts of admiralty, during the same period, has led many American jurists to question *the validity* of the doctrine in the courts of our own country. It is said to be a novel doctrine, lately sprung up, and acted upon as a rule of decision in the English courts, since the period when English decisions have lost the weight of authority in the courts of the United States. It is this position which I shall now examine, acknowledging that I do not hold myself bound by such decisions made since the revolution, although, as evidence of what the law was prior to that period, I read and respect them.

The authority of the case of *Hughes* v. *Cornelius*, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality between the insurer and insured, is denied. It is true that, in that case, the only point expressly decided was, that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences.

This case, as far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that, by the general rule of law, the latter, if conclusive at all, is so as *to the fact directly decided*, as well as to the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What is *the matter* decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was, in effect, enemy-property. Can the parties to that sentence be bound by so much of *it as works a loss of the property, because it was declared to be enemy-property, and yet be left free to litigate anew in some other form, the very point decided from which this con-

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sequence flowed? Or upon what just principle, let me ask, shall a party to a suit, who has once been heard, and whose rights have been decided by a competent tribunal, be permitted, in another court of concurrent jurisdiction, and, in a different form of action, to litigate the same question, and to take another chance for obtaining a different result? I confess I am strongly inclined to think that the case of *Hughes* v. *Cornelius* laid a strong foundation for the doctrine which was built upon it, and which for many years past has been established law in England. This opinion is given with the more confidence, when I find it sanctioned by the positive declarations of distinguished law characters; men who are, of all others, the best able to testify respecting the course of decisions upon the doctrine I am examining, and the source from which it sprung.

In the case of *Lothian* v. *Henderson*, 3 *Bos. & Pull.* 499. *Chambre*, J. speaking upon this point, says, that the sentence of the French court was in that case conclusive against the claim of the assured, "agreeable to all the decisions upon the subject, beginning with the case of *Hughes* v. *Cornelius*, (confirmed as that was by the opinion of Lord *Holt* in two subsequent cases,) and pursuing them down to the present period. It is true," he observes, "that in *Hughes* v. *Cornelius*, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute." But from that period to the present, the doctrine there laid down respecting foreign sentences has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover." *Le Blanc*, J. says, "that these sentences are admissible and conclusive evidence of the fact they decide it seems not safe now to question: from the time of *Car.* II. to this day, they have been received as such, without being questioned. In the discussion of
* 440 the nature of such evidence before this *house, in 1776, it seems not to have been controverted; and the cases, I may say, are numberless, and the property immense, which have been determined on the conclusiveness of such evidence, in many of which cases, the forms in which they came before the courts in Westminster Hall were such as to have enabled the parties, if any doubt

had been entertained, to have brought the question before a higher tribunal." *Lawrence*, J. also speaking of the legal effect of a foreign sentence upon this point, says, "as to which, after the continued practice which has taken place from the *earliest period*, in which, in actions on policies of insurance, questions have arisen on warranties, to admit such sentences in evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, supposing that practice might, upon the argument, have appeared to have been doubtful at first." *Rooke*, J. Lord *Eldon*, and Lord *Alvanley*, all concur in giving the same testimony, that the doctrine under consideration had been established for a long period of years, by a long series of adjudications in the courts of Westminster Hall.

I cite this case for no other purpose but to prove, by the most respectable testimony, that the case of *Hughes* v. *Cornelius*, decided in the reign of *Car.* II. had, by a uniform course of decisions from that time, been considered as warranting the rule now so firmly established in England. And when the inquiry is, whether the application of the principle laid down in that case to questions arising on warranties in actions on policies, be of ancient or modern date, I think I may safely rely upon the declarations of the English judges, when they concur in the evidence they give respecting the fact. It is true that no case was cited at the bar recognising the application of the rule to questions between the insurer and insured prior to the revolution, except that of *Fernandez* v. *Da Costa*, which I admit was a *Nisi Prius* decision. But were I convinced that the long series of decisions upon this point, from the time of *Hughes* v. *Cornelius*, spoken of by the judges in the case of *Lothian* v. *Henderson*, had been made at *Nisi Prius*, it *would not, in my mind, weaken the authority of the doctrine. It would prove the sense of all the judges of England, as well as of the bar, of the correctness and legal validity of the rule. It is not to be supposed that if a doubt had existed respecting the law of those decisions, the point would not have been reserved for a more deliberate examination, before some of the courts of Westminster Hall. But the case of *Fernandez* v. *Da Costa* receives

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additional weight, when it is recollected that the judge who decided it was Lord *Mansfield*, and when, upon examining it, we find no intimation from him that there was any novelty at that day in the doctrine. To this strong evidence of the antiquity of the rule, may be added that of Judge *Buller*, who, at the time he wrote his *Nisi Prius*, considered it as then established.

That the doctrine was considered as pefectly fixed in the year 1781, is plainly to be inferred, from the case of *Bernardi* v. *Motteux*, decided in that year. Lord *Mansfield* speaks of it as he would of any other well established principle of law, declaring, in general terms, that the sentence, as to that which is w thin it, is conclusive against all persons, and cannot be collaterally controverted in any other suit. The only difficulty in that case was, to discover the real ground upon which the foreign sentence proceeded, and the court in that and many subsequent cases laid down certain principles auxiliary to the rule, for the purpose of ascertaining the real import of the sentence in relation to the fact decided as between the insurer and insured. For if the sentence did not proceed upon the ground of the property not being neutral, it of course concluded nothing against the insured; since upon no other ground could the sentence be said to falsify the warranty.

It was admitted by the counsel for the insured, that as between him and the insurer, the sentence is *prima facie* evidence of a non-compliance with the warranty. But if they are right in their arguments as to the inconclusiveness of the sentence, I would ask for the authority upon which the sentence can be considered as *prima facie*
* 442 evidence. Certainly no case was referred *to, and I have not met with one to warrant the position. If we look to general principles applicable to domestic judgment, they are opposed to it. We have seen that the judgment is conclusive between the same parties, upon the same matter coming incidentally in question. The judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is *prima facie evidence*. But it is to be remarked, that in such a case, the judgment is no more conclusive as to the right it establishes, than as to the fact it decides. Now it is admitted that

the sentence of a foreign court of admiralty is conclusive upon the right to the property in question; upon what principle, then, can it be *prima facie* evidence, if not *conclusive*, upon the facts directly decided. A domestic judgment is not even *prima facie* evidence between those not parties to it, or those claiming under them, and that would clearly be the rule, and for a similar reason as to foreign judgments. If between the same parties, the former is conclusive as to the right and as to the facts decided, this principle, if applied at all to foreign sentences, which it certainly is, is either applicable throughout, upon the ground that the parties are the same, or if not so, then by analogy to the rule applying to domestic judgments, the sentence cannot be evidence at all.

Upon the whole, I am clearly of opinion, that the sentence of the court of admiralty at Barbadoes, condemning the brig Fame and her cargo as prize, on account of an attempt to break the blockade of Martinique, is conclusive evidence in this case against the insured, to falsify his warranty of neutrality.

If the injustice of the belligerent powers, and of their courts, should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of *Hughes* v. *Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the control of those who are merely to pronounce what the law is, * 443 and if from any circumstance it has become impolitic, in a national point of view, it is for the nation to annul or to modify it. Till this is done, by the competent authority, I consider the rule to be inflexible.(a)

(a) Judges *Chase* and *Livingston* dissented; and Judge *Todd*, not having been present at the argument, gave no opinion. So that this judgment is reversed by the opinions of *Marshall*, Ch. J. *Cushing*, *Washington*, and *Johnson*, Justices.

THE UNITED STATES *v.* THE SCHOONER BETSEY AND CHARLOTTE, AND HER CARGO.

All seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction, and are to be tried *without* a jury.

Quære, whether the answer of the claimant to the libel ought not always to be upon oath if required; and whether he is not bound to submit to answer interrogatories upon oath, *vivavoce* in open court.

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Whether, on the trial of a vessel for violation of the law prohibiting intercourse with certain ports in St. Domingo, evidence be admissible that other vessels belonging to the same owner, were at the same prohibited port at the same time; as a circumstance tending to discredit the evidence of distress set up as an excuse for going to such prohibited port?

THIS was an appeal from the sentence of the *circuit court* of the district of Columbia, reversing that of the *district court*, which condemned the *schooner Betsey and Charlotte*, and her cargo, as forfeited, for a violation of the act of congress of the 28th of February, 1806, entitled, "An act to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo." *Laws U. S. vol.* 8. *p.* 11.

The libel being filed, and the monition returned executed, the claimant appeared, and having given *fidejussory caution*, to respond the costs, offered a plea admitting all the facts charged in the libel, excepting the *voluntary* carrying of the vessel into the port of *Cape François*, the prohibited port mentioned in the libel, which he denied, and "*thereof put himself on the country.*" But the district judge rejected the plea, and ordered the claimant to answer *on oath:* whereupon the claimant offered the same denial on oath, by way of answer; to the receiving of which the attorney for the United States objected, unless the claimant would make oath to answer truly all interrogatories which might be *put to him relative to the cause; but the judge overruled the objection, and received the answer, saying that the United States might except to the answer, in the same manner as to an answer in chancery; *or*, might reply, setting forth new facts not inconsistent with the libel, and put interrogatories thereupon, as upon the allegations in a bill in chancery, which, if proper and pertinent, must be answered; as was done in the case of *Maley* v. *Shattuck*, (*ante*, vol. 3. p. 458.)

The attorney for the United States filed a replication, and propounded interrogatories, which he prayed might be answered by the claimant *viva voce*, *in open court*. To this the claimant objected, but the judge overruled the objection.

The Betsey and Charlotte sailed from Alexandria in September, 1806, with a clearance for *St. Jago de Cuba.* United States v. Betsey.

Upon the trial, the attorney for the United States produced and offered evidence, that during the months of August and September in the same year, two other vessels, owned in whole or in part by the claimant, sailed from Alexandria, with clearances for *St. Jago de Cuba*, and, as well as the *Betsey and Charlotte*, arrived at *Cape François.* To this evidence the claimant objected, but the judge overruled the objection, and heard the evidence.

From the sentence of condemnation by the district judge, the claimant appealed to the circuit court, and new evidence being admitted, the sentence was reversed, and restoration awarded. From this sentence the United States appealed to *this* court, where witnesses were examined *viva voce*, both on the part of the United States and on that of the claimant.

C. Lee, for the claimant, stated that he should contend,

1. That the proceedings ought to have been according to the course of the common law, and the facts ought to have been tried by a jury.

2. That the judge ought not to have compelled the claimant to answer upon oath; and, * 445

3. That the vessel ought to be acquitted upon the facts of the case.

Jones, for the United States, was stopped by the court, who expressed a wish to hear the other side. He wished, however, to be heard, upon the question of putting the claimant to answer upon oath, and was indulged.

He observed that this was not a proceeding *in personam*, but *in rem.* The United States did not bring in the claimant by process, and compel him to answer upon oath, as is done in chancery cases; but the claimant comes in voluntarily to support his interest, and submits to the jurisdiction of the court. He ought to come with clean hands and a pure heart. If this be a case of admiralty jurisdiction, the proceedings must be

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according to the course of the civil law, where the practice universally has been to try cases without a jury. *Wood's Inst. Civ. Law*, 133. 2 *Browne's Civ. Law*, 248, 249. 413. 415, 416. 1 *Browne*, 472. 474. *Maley* v. *Shattuck*, (*ante*, vol. 3. p. 458.) 1 *Domat*, 460. s. 4. Such also was the understanding of the legislature, when they established a fee for the drawing of the interrogatories. *Laws U. S.* vol. 2. p. 222.

The exception in the English statutes applies only to the ecclesiastical courts, and to those interrogatories, the answers to which might subject the party to *ecclesiastical* censures.

But the act of congress upon which this libel is founded, does not make it criminal in the *person* to trade to St. Domingo. It only subjects to forfeiture the property, and renders the party liable upon his bond.

Youngs, contra.

There can be no case of admiralty jurisdiction, unless it be a case under the law of nations. Cases of revenue, or of municipal seizure, are not cases of admiralty and maritime jurisdiction.

* 446 *The 9*th section of the judiciary act*, (vol. 1. p. 53.) merely gives to the *district court* jurisdiction of cases of seizure, but does not make them cases of admiralty. And in all cases at *common law*, the trial by jury is guarantied by the constitution of the United States. The act under which this prosecution is commenced does not direct the form of trial.

The district court, as a court of admiralty, is a court of limited jurisdiction; and in this case, the libel does not state that the seizure was made on waters which are navigable from the sea by vessels of ten or more tons burthen. The fact is not alleged which alone could make it a case of admiralty jurisdiction.

In England, a seizure for violation of the navigation act is tried by information in the court of exchequer, according to the course of the common law.

It is contrary to the principles of the common law to make a man criminate himself.

MARSHALL, Ch. J. said the court wished to hear the counsel for the United States on the question of fact.

Jones. It is to be understood, then, that the court is satisfied as to the questions of law?

MARSHALL, Ch. J. No attempt has been made to distinguish this case from those of *The Vengeance*, 3 *Dall.* 297. and *The Sally*, (*ante*, vol. 2. p. 406.) Those cases have settled the law, and unless this case can be distinguished from those, the court does not think an argument necessary.(*a*)

**Jones.* It is objected that it does not appear upon the face of the libel that the seizure was made upon waters navigable from the sea by vessels of ten and more tons burthen. But it is stated in the libel that the vessel was more than ten tons burthen, that the seizure was made in the *port of Alexandria*, and that the vessel had sailed from that port to the West-Indies, and back to Alexandria, from whence it necessarily follows, that the waters of the port of Alexandria are navigable from the sea by vessels of ten and more tons burthen. Besides, this court is bound to take notice of the ports of entry for foreign vessels established by law; and the port of Alexandria is one of those ports. * 447

In the case of The Vengeance, the court officially took notice that the bay of Sandy-Hook contained waters navigable, &c.

If the jurisdiction appears by necessary inference from what is stated, it is sufficient.

C. Lee, contra.

By the 3d article of the constitution of the United States, the judicial power of the United States is extended "*to all cases of admiralty and maritime jurisdiction.* Congress could not make cases of admiralty and maritime jurisdiction; and under that clause of the

(*a*) *C. Lee.* I hope to show that this case is distinguishable from those; and to be permitted to argue at large the point of law, that this is not a case of admiralty jurisdiction. I argued the case of the *Vengeance*, and I know it was not so fully argued as it might have been; and some of the judges may recollect that it was rather a sudden decision.

CHASE, J. I recollect that the argument was no great thing, but the *Court* took time and *considered the case well.* The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprice of juries.

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constitution they could not give their courts jurisdiction of a case which was not of admiralty and maritime jurisdiction at the time of the adoption of that constitution. The question, then, is, whether, according to the understanding of the people of this country at that time, a seizure of a vessel, within the body of a county, for breach of a municipal law of trade, was a case of admiralty cognisance. It certainly was never so considered in England, from whence we draw all our ideas of admiralty jurisdiction. All seizures in that country for violation of the laws of revenue, trade or navigation, are tried by a jury in the court of exchequer, according to the course of the common law. There is nothing in the course of proceedings *in rem* which requires that they should be in a court of admiralty. A *court of common law is as competent to the trial of such cases as a court of admiralty. The high court of admiralty in England exercises no original jurisdiction in revenue cases. It hears only *appeals* in such cases from the viceadmiralty courts in the colonies, to whom the jurisdiction is given by an act of parliament. 2 *Browne's Civil Law*, 492. 2 *Rob.* 189. *The Sarah.* 4 *Inst.* 135. 139. 2 *Browne*, 75. 78. 3 *Bl. Comm.* 106. *Parker*, 23. 273.

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Nor were such cases ever supposed by the people of this country to be rightfully classed among causes of admiralty. It was one of our serious grievances, and of which we complained against Great Britain in our remonstrances to the king, and in our addresses to the people of Great Britain, while we were colonies, that the jurisdiction of the courts of viceadmiralty was extended to cases of revenue. *Journals of the old Congress*, vol. 1. p. 47. Such being the understanding of the people of this country at the adoption of the constitution, we are to presume that the words "*cases of admiralty and maritime jurisdiction*," did not include cases of seizure like the present. The 9th section of the judiciary act (vol. 1. p. 53.) is to be construed with a reference to the meaning of those expressions in the constitution; and if it cannot, consistently with the force of its terms, be reconciled with the constitution, it must yield to the superior obligations of that instrument. The words of that section of the act, as far as they affect the present question, are, "and shall also

have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, *including* all seizures under laws of impost, navigation, or trade, of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas: saving to suitors, *in all cases*, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognisance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred under the laws of the United States." "And the trial of issues in fact in the *district courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury." *449

The word "*including*" means only, *moreover*, or, *as well as*.

The district court shall have exclusive original cognisance of *all* civil causes of admiralty and maritime jurisdiction, *including*, within its exclusive original cognisance, all seizures, &c. It does not mean *including within the expression* "*all civil causes of admiralty*," &c. If such cases of seizure were civil causes of admiralty and maritime jurisdiction, there was no necessity to enumerate them, because the expression, *all* civil causes of admiralty, &c. certainly included them. If they were not civil causes of admiralty and maritime jurisdiction, congress could not make them such, nor by forcing them into that class, deprive the citizen of his right to a trial by jury. Congress had no such intention, for in the very same breath they say, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." We have seen that in all cases of seizure for breaches of the laws of revenue, trade or navigation, the common law is competent to give a remedy; and, consequently, this suitor is entitled to it.

The several acts of congress creating forfeitures for breaches of the laws of revenue, &c. all seem to refer to the exchequer practice, rather than to that of the admiralty.

In the act for registering vessels, passed the 31st *of*

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December, 1792, (*Oswald's edition of the Acts of Congress*, vol. 2. p. 134. 144. s. 4. and 16.) if the owner shall take a false oath, "there shall be a forfeiture of the vessel, &c. or of the value thereof, to be recovered *with costs of suit*," of the person taking the false oath. So in case of the sale of a vessel to a foreigner, it shall be forfeited in a certain case, "provided that if it shall be made appear to *the jury* before whom the trial for such forfeiture shall be had, that," &c. and the penalties and *forfeitures* under that act were to "be *sued* * 450 *for*, *prosecuted* and *recovered*," in such courts, &c. *as penalties and forfeitures under the act for the collection of duties, &c. Hence it is evident that congress intended that all cases of forfeiture should be tried by jury. The expressions in the act respecting registering of vessels, explain what may otherwise appear doubtful in the act concerning the collection of duties, as to the mode of prosecution.

So in the act suspending intercourse with France, vol. 1. p. 245. offending vessels are made liable to be seized, "and may be prosecuted and condemned in any *circuit* or district court of the United States, which shall be holden within or for the district where the seizure shall be made."

But by the judiciary act no *circuit* court could take original cognisance of civil causes of admiralty and maritime jurisdiction; hence it is obvious that congress did not consider such seizures as civil causes of admiralty, &c. The forfeiture also is to accrue to any person "who will *inform* and *prosecute* for the same," which shows that the proceedings were to be at common law.

All the forfeitures under the act for the collection of duties, are to be recovered in the same way. *Some* of them being cases of seizure on land, must be tried by jury, therefore *all* must. And in sect. 71. (vol. 4. p. 391.) it is said, "in *actions*, *suits* or *informations* to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case, the *onus probandi* shall be upon such claimant." These expressions all indicate proceedings at common law only.

The 89th sect. in p. 427, speaking of the recovery of

penalties, clearly refers to suits at common law; and when speaking of *forfeitures*, it says, "and all ships, goods, &c. which shall become forfeited in virtue of this act, shall be seized, libelled and *prosecuted as aforesaid;*" referring to the mode of prosecution pointed out for the recovery of penalties. Here, if the word "*libelled*" had not been used, there could be no doubt. But the expression "*libelled*" relates as well to *seizures on land, as to seizures on water; but seizures on land must be tried by jury according to the course of the common law. The word libel, therefore, does not refer exclusively to admiralty proceedings. *451

The Excise Law, vol. 1. p. 313. makes no distinction between seizures made on land, and those made on water.

By the 5th amendment to the constitution, no person shall be deprived of property, *without due process of law;* which means by due process of the *common* law.

By the 7th amendment, in suits at common law the right of trial by jury shall be *preserved, i. e.* continued as it then was. At that time all municipal seizures were triable at common law.

The act prohibiting the intercourse with St Domingo differs from that under which the *Vengeance* was prosecuted.

There the mode of prosecution was declared to be the same as for penalties and forfeitures under the act for collecting duties; but here no mode of prosecution is prescribed.

The act creates two offences.

1. Sailing to St Domingo without being destined for that island.

2. Being destined and sailing for a prohibited port without arriving there. The offence of destination is an offence on land, and to be tried by the course of the common law. Hence also it may be inferred that the other offence is to be tried in the same manner. No difference is made by the statute.

The act requires bonds to be given, which are forfeited if the offence has been committed. Suits at common law upon these bonds are now pending. If these had been tried first, the facts must have been decided by

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a *jury, and by the 7th amendment of the constitution, "no fact tried by a jury, shall be *otherwise* re-examined in any court of the United States *than according to the rules of the common law.*" The consequence would have been that this case, involving the same fact, between the same parties, could not have been otherwise tried than by a jury. It could not have been the intention of congress that in one case the same fact should be decided by the judge, and in the other by a jury.

The case of *The Sally* was decided upon the authority of that of the Vengeance, without argument; and is, therefore, of no authority.

Rodney, Attorney-General, in reply, was stopped by the court as to the *law* of the case.

MARSHALL, Ch. J. The court considers the law as completely settled by the case of *The Vengeance.* A distinction has been attempted to be drawn between this case and that, but the court can see no difference. It is the place of seizure, and not the place of committing the offence, which decides the jurisdiction.

It has been said the word "*including*" means *moreover*, or *as well as;* but if this was the meaning of the legislature it was a very embarrassing mode of expressing the idea. It is clear that congress meant to discriminate between seizures on waters navigable from the sea, and seizures upon land or upon waters not navigable; and to class *the former* among the civil causes of admiralty and maritime jurisdiction.

The only doubt which could arise would be upon the clause of the constitution respecting the trial by jury. But the case of the Vengeance settles that point.

The sentence of the circuit court was reversed, and that of the district court affirmed.

APPENDIX.

Note (A.)

Documents accompanying the President's message of January 22, 1807.

WILKINSON'S FIRST AFFIDAVIT.

UNITED STATES *v.* BOLLMAN AND SWARTWOUT.

I, JAMES WILKINSON, brigadier-general and commander in chief of the army of the United States, to warrant the arrest of Doctor Erick Bollman, on a charge of treason, misprision of treason, or such other offence against the government and laws of the United States, as the following facts may legally charge him with, on my honour as a soldier, and on the Holy Evangelists of Almighty God, do declare and swear, that on the sixth day of November last, when in command at Natchitoches, I received by the hands of a Frenchman, a stranger to me, a letter from Doctor Erick Bollman, of which the following is a correct copy.

New Orleans, September 27, 1806.

"SIR,

"I HAVE the honour to forward to your excellency the *enclosed letters*, which I was charged to deliver to you by our mutual friend. I shall remain for some time at this place, and should be glad to learn where and when I may have the pleasure of an interview with you. Have the goodness to inform me of it, and please to direct your letter to me, care of , or enclose it under cover to them.

"I have the honour to be,
"With great respect, Sir,
"Your excellency's most obedient servant,
(Signed) "ERICK BOLLMAN.
"Gen. WILKINSON."

Covering a communication in cypher from Colonel Aaron Burr, of which the following is substantially as fair an interpretation as I have heretofore been able to make, the original of which I hold in my possession: "I (Aaron Burr) have obtained funds, and have *actually commenced the enterprise.* Detachments from different points, and *under different pretences,* will rendezvous on the Ohio, 1st November. Every thing internal and external favours views; protection of England is secured. T.* is gone to Jamaica to arrange with the admiral on that station, and will meet at the Mississippi——England——navy of the United States are ready to join, and final orders are given to my friends and followers; it will be a host of choice spirits. Wilkinson shall be second to Burr only; Wilkinson shall dictate the rank and promotion of his officers. Burr will proceed westward 1st August, never to return; with *him* go his daughter; the husband will follow in October with a *corps of worthies;* send forthwith an intelligent and confidential friend, with whom Burr may confer; he shall return immediately with further interesting details; this is essential to concert and harmony of movement; send a list of all persons known to Wilkinson west of the mountains, who could be useful, with a note delineating their characters.

"By your messenger send me four or five of the commissions of your officers, which you can borrow under any pretence you please; they shall be returned faithfully; already are orders to the contractor given to forward six months' provisions to points Wilkinson may name; this shall not be used until the last moment, and then under proper injunctions; the project is brought to the point so long desired; Burr guaranties the result with his life and honour, the lives, the honour, and fortunes of hundreds, the best blood of our country; Burr's plan of operations is to move down rapidly from the falls on the fifteenth of November, with the first five hundred or one thousand men, in light boats, now constructing for that purpose; to be at Natchez between the fifth and fifteenth of December, then to meet Wilkinson; then to determine whether it will be expedient, in the first instance, to seize on, or pass by, Baton Rouge; on receipt of this send Burr an answer; draw on Burr for all expenses, &c. The people of the country to which we are going are prepared to receive us; their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, that in three weeks all will be settled. The Gods invite to glory and fortune; it remains to be seen whether we deserve the boon; the bearer of this goes express to you; he will hand a formal letter of introduction to you from Burr, a copy of which is hereunto subjoined; he is a man of inviolable honour and perfect discretion; formed to execute rather than to project; capable of relating facts with fidelity, and incapable of relating them otherwise; he is thoroughly informed of the plans and intentions of , and will disclose to you as far as you inquire, and no further; he has imbibed a reverence for your

* Truxton.

character, and may be embarrassed in your presence; put him at ease and he will satisfy you; Doctor Bollman, equally confidential, better informed on the subject, and more intelligent, will hand this duplicate.

"29th *July*."

The day after my arrival at this city, the 26th of November last, I received another letter from the doctor, of which the following is a correct copy.

New Orleans, November 25, 1806.

"SIR,

"Your letter of the 16th inst. has been duly received; supposing that you will be much engaged this morning, I defer waiting on your excellency till you will be pleased to inform me of the time when it will be convenient to you to see me.

"I remain with great respect,
"Your excellency's most obedient servant,
"ERICK BOLLMAN.

"His excellency Gen. WILKINSON, Fauxbourg."

Marigny, the house between Madame Trevigne and M. Macarty.

On the 30th of the same month I waited in person on Doctor E. Bollman, when he informed me that he had not heard from Colonel Burr since his arrival here. That he (the said Doctor E. Bollman) had sent despatches to Colonel Burr by a Lieutenant Spence, of the navy, and that he had been advised of Spence's arrival at Nashville, in the state of Tennessee, and observed that Colonel Burr had proceeded too far to retreat, that he (Colonel Burr) had numerous and powerful friends in the United States, who stood pledged to support him with their fortunes, and that he must succeed. That he (the said Doctor E. Bollman) had written to Colonel Burr on the subject of provisions, and that he expected a supply would be sent from New-York, and also from Norfolk, where Colonel Burr had strong connections. I did not see or hear from the doctor again until the 5th inst. when *I called on him the second time.* The mail having arrived the day before, I asked him whether he had received any intelligence from Colonel Burr; he informed me that he had seen a letter from Colonel Burr of the 30th October, in which he (Colonel Burr) gave assurances that he should be at Natchez with 2,000 men on the 20th December, inst. where he should wait until he heard from this place; that he would be followed by 4,000 men more, and that he, (Colonel Burr,) if he had chosen, could have raised or got 12,000 as easily as 6,000, but that he did not think that number necessary. Confiding fully in this information, I became indifferent about further disguise. I then told the doctor that I should most certainly oppose Colonel Burr if he came this way. He replied that they must come here for *equipments and shipping*, and observed that he did not know what had passed between Colonel Burr and myself, obliqued at a sham defence, and waived the subject.

From the documents in my possession, and the several communications, verbal as well as written, from the said Doctor Erick Bollman, on this subject, I feel no hesitation in declaring under the solemn obligation of an oath, that he has committed misprision of treason against the government of the United States.

(Signed) JAMES WILKINSON.

Signed and sworn to this 14th day of December, 1806, before me, one of the justices of the peace of this county.

(Signed) J. CARRICK.

"*Philadelphia, July* 25, 1806.

"DEAR SIR,

"Mr. Swartwout, the brother of Colonel S. of New-York, being on his way down the Mississippi, and presuming that he may pass you at some post on the river, has requested of me a letter of introduction, which I give with pleasure, as he is a most amiable young man, and highly respectable from his character and connections. I pray you to afford him any friendly offices which his situation may require, and beg you to pardon the trouble which this may give you.

"With entire respect,

"Your friend and obedient servant,

"A. BURR.

"His excellency Gen. WILKINSON."

Message from the President of the United States to the Senate and House of Representatives.

I RECEIVED from Gen. Wilkinson, on the 23d inst. his affidavit, charging Samuel Swartwout, Peter V. Ogden, and James Alexander, with the crimes described in the affidavit, a copy of which is now communicated to both houses of congress.

It was announced to me at the same time, that Swartwout and Bollman, two of the persons apprehended by him, were arrived in this city in custody each of a military officer. I immediately delivered to the attorney of the United States, in this district, the evidence received against them, with instructions to lay the same before the judges, and apply for their process to bring the accused to justice, and I put into his hands orders to the officers having them in custody, to deliver them to the marshal on his application.

TH. JEFFERSON.

January 26, 1807.

WILKINSON'S SECOND AFFIDAVIT.

I, JAMES WILKINSON, brigadier-general and commander in chief of the army of the United States, to warrant the arrest of Samuel Swartwout, James Alexander, Esq. and Peter V. Ogden, on a charge of treason, misprision of *treason*, or such other offence against the government and laws of the United States, as the following facts may legally charge them with, on the honour of a soldier, and on the Holy Evangelists of Almighty God, do declare and swear, that in the beginning of the month of October last, when in command at Natchitoches, a stranger was introduced to me by Colonel Cushing, by the name of Swartwout, who a few minutes after the colonel retired from the room, *slipt* into my hand a letter of formal introduction from colonel Burr, of which the following is a correct copy:

"*Philadelphia*, 25th *July*, 1806.

"DEAR SIR,

"Mr. Swartwout, the brother of Colonel S. of New-York, being on his way down the Mississippi, and presuming that he may pass you at some post on the river, has requested of me a letter of introduction, which I give with pleasure, as he is a most amiable young man, and highly respected from his character and connections. I pray you to afford him any friendly offices which his situation may require, and beg you to pardon the trouble which this may give you.

"With entire respect,

"Your friend and obedient servant,

(Signed) "A. BURR.

"His excellency General WILKINSON."

Together with a packet which he informed me he was charged by the same person, to deliver me *in private*, this packet contained a letter in cypher from Colonel Burr, of which the following is *substantially* as fair an interpretation as *I have heretofore* been able to make, the original of which I hold in my possession:

"I, Aaron Burr, have obtained funds and have actually commenced the enterprise. Detachments from different points and under different pretences, will rendezvous on the Ohio, 1st November. Every thing internal and external favours views; protection of England is secured; T——— is *going* to Jamaica, to arrange with the admiral on that station; it will meet on the Mississippi——England——Navy of the United States are ready to join, and final orders are given to my friends and followers; it will be a host of choice spirits. Wilkinson shall be second to *Burr* only; Wilkinson shall dictate the rank and promotion of his officers. *Burr* will proceed westward 1st August never to return; with him go his daughter; the husband will follow in October, with a corps of *worthies*.

"Send forthwith an intelligent and confidential friend with whom Burr may confer; he shall return immediately with further interesting details; this is essential to concert and harmony of movement; send a list of all persons known to *Wilkinson*, west of the mountains, who may be useful, with a note delineating their characters. By your messenger send me four or five of the commissions of your officers, which you can borrow under any pretence you please; they shall be returned faithfully. Already are orders to the contractor given to forward six months' provisions to points Wilkinson may name; this shall not be used until the last moment, and then under proper injunctions; the project is brought to the point so long desired; Burr guaranties the result with his life and honour; with the lives, the honour and fortunes of hundreds, the best blood of our country. Burr's plan of operations is to move down rapidly from the falls on the 15th November, with the first 500 or 1,000 men, in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December; there to meet Wilkinson; there to determine whether it will be expedient, in the first instance, to seize on, or pass by, Baton Rouge: on receipt of this, send an answer; draw on Burr for all expenses, &c. The people of the country to which we are going are prepared to receive us; their agents now with Burr say, that if we will protect their religion, and will not subject them to a foreign power, that in three weeks all will be settled. The Gods invite to glory and fortune; it remains to be seen whether we deserve the boon; the bearer of this goes express to you; he will hand a formal letter of introduction to you from Burr; he is a man of inviolable honour and perfect discretion; formed to execute rather than to project; capable of relating facts with fidelity, and incapable of relating them otherwise; he is thoroughly informed of the plans and intentions of , and will disclose to you as far as you inquire, and no further; he has imbibed a reverence for your character, and may be embarrassed in your presence put him at ease and he will satisfy you.

"29th *July*."

I instantly resolved to avail myself of the reference made to the bearer, and in the course of some days drew from him (the said Swartwout) the following disclosure: "That he had been despatched by Colonel Burr from Philadelphia, had passed through the states of Ohio and Kentucky, and proceeded from Louisville for St. Louis, where he expected to find me, but discovering at Kaskaskias that I had descended the river, he procured a skiff, hired hands, and followed me down the Mississippi to Fort Adams, and from thence set out for Natchitoches, in company with Captains Sparks and Hooke, under the pretence of a disposition to take part in the campaign against the Spaniards, then depending. That Colonel Burr with the support of a powerful association, extending from New-York to New Orleans, was levying an armed body of 7,000 men from the state of New-York and the western states and territories, with a view to carry an expedition against the Mexican provinces, and that 500 men under Colonel Swartwout and a Colonel or

Major Tyler, were to descend the Alleghany, for whose accommodation light boats had been built, and were ready." I inquired what would be their course; he said, "This territory would be revolutionized, where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans; that they expected to be ready to embark about the first of February, and intended to land at Vera Cruz, and to march from thence to Mexico." I observed that there were several millions of dollars in the bank of this place; to which he replied, "We know it full well;" and on remarking that they certainly did not mean to violate private property, he said they "merely meant to borrow, and would return it; that they must equip themselves in New Orleans; that they expected naval protection from Great Britain; that the Capt. ———, and the officers of our navy, were so disgusted with the government that they were ready to join; that similar disgusts prevailed throughout the western country, where the people were zealous in favour of the enterprise, and that pilot-boat built schooners were contracted for along our southern coast for their service; that he had been accompanied from the falls of Ohio to Kaskaskias, and from thence to Fort Adams, by a Mr. Ogden, who had proceeded on to New Orleans with letters from Colonel Burr to his friends there." Swartwout asked me whether I had heard from Doctor Bollman; and on my answering in the negative, he expressed great surprise, and observed, "That the doctor and a Mr. Alexander had left Philadelphia before him, with despaches for me, and that they were to proceed by sea to New Orleans, where he said they must have arrived."

Though determined to deceive him if possible, I could not refrain telling Mr. Swartwout it was impossible that I could ever dishonour my commission; and I believe I duped him by my admiration of the plan, and by observing, "That although I could not join in the expedition, the engagements which the Spaniards had prepared for me in my front, might prevent my opposing it;" yet I did, the moment I had decyphered the letter, put it into the hands of Colonel Cushing, my adjutant and inspector, making the declaration that I should oppose the lawless enterprise with my utmost force. Mr. Swartwout informed me he was under engagements to meet Colonel Burr at Nashville the 20th of November, and requested of me to write him, which I declined; and on his leaving Natchitoches, about the 18th of October, I immediately employed Lieutenant T. A. Smith to convey the information, in substance, to the president, without the commitment of names; for, from the extraordinary nature of the project, and the more extraordinary appeal to me, I could not but doubt its reality, notwithstanding the testimony before me, and I did not attach solid belief to Mr. Swartwout's reports respecting their intentions on this territory and city, until I received confirmatory advice from St. Louis.

After my return from the Sabine, I crossed the country to Natchez, and on my descent of the Mississippi from that place, I found Swartwout and Peter V. Ogden at Fort Adams; with the latter I held no communication, but was informed by Swartwout, that he (Ogden) had

returned so far from New Orleans, on his route to Tennessee, but had been so much alarmed by certain reports in circulation that he was afraid to proceed. I inquired whether he bore letters with him from New Orleans, and was informed by Swartwout that he did not, but that a Mr. Spence had been sent from New Orleans through the country to Nashville, with letters for Colonel Burr.

I reached this city the 25th ultimo, and on the next morning James Alexander, Esq. visited me: he inquired of me aside whether I had seen Doctor Bollman, and on my answering in the negative, he asked me whether I would suffer him to conduct Bollman to me, which I refused. He appeared desirous to communicate something, but I felt no inclination to inculpate this young man, and he left me. A few days after he paid me a second visit, and seemed desirous to communicate, which I avoided until he had risen to take leave; I then raised my finger, and observed, "Take care, you are playing a dangerous game." He answered, "It will succeed." I again observed, "Take care;" and he replied with a strong affirmation, "Burr will be here by the beginning of next month." In addition to these corroborating circumstances against Alexander, I beg leave to refer to the accompanying documents, A. B. From all which I feel no hesitation in declaring, under the solemn obligation of an oath, that I do believe the said Swartwout, Alexander, and Ogden, have been parties to, and have been concerned in, the insurrection formed, or forming, in the states and territories on the Ohio and Mississippi rivers, against the laws and constitution of the United States.

(Signed) JAMES WILKINSON.

Sworn to, and subscribed before me, this 26th day of December, in the year of our Lord, 1806.

(Signed) GEORGE POLLOCK,
Justice of the Peace, for the county of Orleans.

The following are the depositions made in open court and alluded to in the foregoing statement:

THE DEPOSITION OF WILLIAM EATON, ESQ.

Early last winter Col. Aaron Burr, late Vice-President of the United States, signified to me, at this place, that, under the authority of the general government, he was organizing a secret expedition against the Spanish provinces on our south western borders, which expedition he was to lead, and in which he was authorized to invite me to take the command of a division. I had never before been made personally acquainted with Col. Burr; and, having for many years been employed in foreign service, I knew but little about the estimation this gentleman

now held in the opinion of his countrymen and his government; the rank and confidence by which he had so lately been distinguished, left me no right to suspect his patriotism. I knew him a soldier. In case of a war with the Spanish nation, which, from the tenor of the president's message to both houses of congress, seemed probable, I should have thought it my duty to obey so honourable a call of my country; and, under that impression, I did engage to embark in the expedition. I had frequent interviews with Col. Burr in this city, and, for a considerable time, his object seemed to be to instruct me by maps, and other information, the feasibility of penetrating to Mexico; always carrying forward the idea that the measure was authorized by government. At length, some time in February, he began by degrees to unveil himself. He reproached the government with want of character, want of gratitude, and want of justice. He seemed desirous of irritating resentment in my breast, by dilating on certain injuries he felt I had suffered from reflections made on the floor of the house of representatives concerning my operations in Barbary, and from the delays of government in adjusting my claims for disbursements on that coast during my consular agency at Tunis; and he said he would point me to an honourable mode of indemnity. I now began to entertain a suspicion that Mr. Burr was projecting an unauthorized military expedition, which, to me, was enveloped in mystery; and, desirous to draw an explanation from him, I suffered him to suppose me resigned to his counsel. He now laid open his project of revolutionizing the western country; separating it from the union; establishing a monarchy there, of which he was to be the sovereign, and New Orleans to be his capital; organizing a force on the waters of the Mississippi, and extending conquest to Mexico. I suggested a number of impediments to his scheme; such as the republican habits of the citizens of that country, and their affection towards our present administration of government; the want of funds; the resistance he would meet from the regular army of the United States on those frontiers; and the opposition of Miranda, in case he should succeed to republicanize the Mexicans.

Mr. Burr found no difficulty in removing these obstacles; he said he had, the preceding season, made a tour through that country, and had secured the attachment of the principal citizens of Kentucky, Tennessee, and Louisiana, to his person and his measures; declared he had inexhaustible resources to funds; assured me the regular army would act with him, and would be reinforced by ten or twelve thousand men from the above-mentioned states and territory, and from other parts of the union; said he had powerful agents in the Spanish territory; and, as for Miranda, said Mr. Burr, we must hang Miranda. He now proposed to give me the second command in his army. I asked him who should have the chief command? He said, *General Wilkinson*. I observed it was singular that he should count on General Wilkinson; the elevated rank and high trust he now held as commander in chief of our army and governor of a province, he would hardly put at hazard

for any precarious prospects of aggrandizement. Mr. Burr said, General Wilkinson, balanced in the confidence of government, was doubtful of retaining much longer the consideration he now enjoyed, and was, consequently, prepared to secure to himself a permanency. I asked Mr. Burr if he knew General Wilkinson? He answered yes, and echoed the question. I said I knew him well. "What do you know of him?" said Mr. Burr. I know, I replied, that General Wilkinson will act as *lieutenant* to no man in existence. "You are in an error," said Mr. Burr; "*Wilkinson will act as lieutenant to me.*" From the tenor of repeated conversations with Mr. Burr, I was induced to believe the plan of separating the union, which he had contemplated, had been communicated to, and approved of by, General Wilkinson; (though I now suspect it an artful argument of seduction;) and he often expressed a full confidence that the general's influence, the offer of double pay and double rations, the prospect of plunder, and the ambition of achievement, would draw the army into his measures. Mr. Burr talked of the establishment of an independent government west of the Alleghany as a matter of inherent constitutional right of the people, a change which would eventually take place, and for the operation of which the present crisis was peculiarly favourable. There was, said he, no energy in the government to be dreaded, and the divisions of political opinions throughout the union was a circumstance of which we should profit. There were very many enterprising men among us, who aspired to something beyond the dull pursuits of civil life, and who would volunteer in this enterprise, and the vast territory belonging to the United States, which offered to adventurers, and the mines of Mexico, would bring strength to his standard from all quarters. I listened to the exposition of Colonel Burr's views with seeming acquiescence. Every interview convinced me more and more that he had organized a deep laid plot of treason in the west, in the accomplishment of which he felt fully confident. Till, at length, I discovered that his ambition was not bounded by the waters of the Mississippi and Mexico, but that he meditated overthrowing the present government of our country. He said, if he could gain over the marine corps, and secure the naval commanders, Truxton, Preble, Decatur, and others, *he would turn congress neck and heels out of doors, assassinate the president, seize on the treasury and the navy, and declare himself the protector of an energetic government.* The honourable trust of corrupting the marine corps, and of sounding Commodore Preble and Captain Decatur, Colonel Burr proposed confiding to me. Shocked at this proposition, I dropped the mask, and exclaimed against his views. He talked of the degraded situation of our country, and the necessity of a *blow* by which its energy and its dignity should be restored; said, if that blow could be struck here at this time, he was confident of the support of the best blood of America. I told Colonel Burr he deceived himself in presuming that he, or any other man, could excite a party in this country who would countenance him in such a plot of desperation, murder and treason. He replied, that he, perhaps, knew better

the dispositions of the influential citizens of this country than I did. I told him one solitary word would destroy him. He asked what word? I answered, *Usurper!* He smiled at my hesitation, and quoted some great examples in his favour. I observed to him, that I had lately travelled from one extreme of the union to the other; and though I found a diversity of political opinion among the people, they appeared united at the most distant aspect of national danger. That, for the section of the union to which I belonged, I would vouch, that should he succeed in the first instance here, he would within six weeks afterwards have his throat cut by Yankee militia.

Though wild and extravagant Mr. Burr's last project, and though fraught with premeditated slaughter, I felt very easy on the subject, because its defeat he had deposited in my own hands. I did not feel so secure concerning that of disjointing the union. But the very interesting and embarrassing situation in which his communications placed me, left me, I confess, at a stand to know how to conduct myself with propriety. He had committed no overt act of aggression against law. I could draw nothing from him in writing, nor could I learn that he had exposed his plans to any person near me, by whom my testimony could be supported. He had mentioned to me no persons who were principally and decidedly engaged with him, except General Wilkinson, a Mr. Alston, who I found was his son-in-law, and a Mr. Ephraim Kibby, late a captain of rangers in General Wayne's army. Satisfied that Mr. Burr was resolute in pushing his project of rebellion in the west of the Alleghany, and apprehensive that it was too well and too extensively organized to be easily suppressed; though I dreaded the weight of his character when laid in the balance against my solitary assertion, I brought myself to the resolution to endeavour to defeat it by getting him removed from among us, or to expose myself to all consequences by a disclosure of his intentions. Accordingly, I waited on the President of the United States; and after some desultory conversation, in which I aimed to draw his view to the westward, I used the freedom to say to the president I thought Mr. Burr should be sent out of this country, and gave for reason that I believed him dangerous in it. The president asked where he should be sent? I mentioned London and Cadiz. The president thought the trust too important, and seemed to entertain a doubt of Mr. Burr's integrity. I intimated that no one, perhaps, had stronger grounds to mistrust Mr. Burr's moral integrity than myself; yet, I believed, ambition so much predominated over him, that when placed on an eminence, and put on his honour, respect to himself would insure his fidelity: his talents were unquestionable. I perceived the subject was disagreeable to the president; and to give it the shortest course to the point, declared my concern that if Mr. *Burr were not in some way disposed of, we should, within eighteen months, have an insurrection, if not a revolution, on the waters of the Mississippi.* The president answered, *that he had too much confidence in the information, the integrity, and the attachment to the union*, of the citizens of that country, to admit an *apprehension* of the kind. I am happy that

events prove this confidence well placed. As no interrogatories followed my expression of alarm, I thought silence on the subject, at that time and place, became me. But I detailed, about the same time, the whole projects of Mr. Burr to certain members of congress. They believed Colonel Burr capable of any thing, and agreed that *the fellow ought to be hanged*; but thought his projects too chimerical, and his circumstances too desperate, to give the subject the merit of serious consideration. The total security of feeling in those to whom I had rung the tocsin, induced me to suspect my own apprehensions unseasonable, or at least too deeply admitted; and, of course, I grew indifferent about the subject.

Mr. Burr's visits to me became less frequent, and his conversation less familiar. He appeared to have abandoned the idea of a general revolution, but seemed determined on that of the Mississippi; and, although I could perceive symptoms of distrust in him towards me, he manifested great solicitude to engage me with him in the enterprise. Weary of his importunity, and at once to convince him of my serious attachments, I gave the following toast to the public: The *United* States—Palsy to the brain that should plot to dismember, and leprosy to the hand that will not draw to defend, *our union!*

I doubt whether the sentiment was better understood by any of my acquaintance than Colonel Burr. Our intercourse ended here; we met but seldom afterwards. I returned to my farm in Massachusetts, and thought no more of Mr. Burr, nor his empire, till some time late in September or beginning of October, when a letter from Morris Belknap, of Marietta, to Timothy E. Danielson, fell into my hands at Brimfield, which satisfied me that Mr. Burr had actually commenced his preparatory operations on the Ohio. I now spoke publicly f the fact; transmitted a copy of the letter from Belknap to the department of state, and about the same time forwarded, through the hands of the postmaster-general, to the President of the United States, a statement in substance of what is here above detailed concerning the Mississippi conspiracy of the said Colonel Aaron Burr, which is said to have been the first formal intelligence received by the executive on the subject of the conspirator being in motion.

I know not whether my country will allow me the merit of correctness of conduct in this affair. The novelty of the duty might, perhaps, have embarrassed stronger minds than mine. The uprightness of my intentions, I hope, will not be questioned.

The interviews between Colonel Burr and myself, from which the foregoing statement has resulted, were chiefly in this city, in the months of February and March, last year.

WILLIAM EATON.

Washington City, Jan. 26, 1807.

Sworn to in open court, this 26th day of January, 1807.

WILLIAM BRENT, Clerk.

DEPOSITION OF JAMES L. DONALDSON.

In open court personally appears James Lowry Donaldson, who, being duly sworn, deposeth and saith, that he was in the city of New Orleans, in the Orleans territory, and the environs of said city, from the 15th day of October to the 10th day of December, 1806; that during the latter part of this time he was frequently in the company of General James Wilkinson, and visited the general the day after his arrival at New Orleans. On this occasion, this deponent received in confidence from General Wilkinson information to the following purport: that the general had undoubted and indisputable evidence of a treasonable design formed by Aaron Burr and others to dismember the union, by a separation of the western states and territories from the Atlantic states; that New Orleans was in immediate danger, and that he had concluded a hasty compromise with the Spaniards, so as to be able to withdraw his troops instantly to this the immediate object of attack and great vulnerable point; that he had received a letter from Burr holding forth great inducements to him to become a party, of which he showed me the original in cypher, and another written paper purporting to be a decyphered copy of the letter. He expressed great indignation at the plot, and surprise that one so well acquainted with him as Burr should dare to make to him so degrading a proposal, and declared his determination of defeating the enterprise, or perishing in the attempt. He observed, in addition, that there were many agents of Mr. Burr then in the town, who had already been assiduous in their visits, and towards whom he was determined to act with cautious ambiguity, so as at the same time to become possessed of the whole extent of the plan, the persons engaged, and the time of its execution, and also to prevent any attempt on his person, of which he declared he had serious apprehensions. Of the number of these agents he was not aware, but mentioned the names of two of whom he was certain, Messrs. Bollman and Alexander. From time to time, as this deponent had interviews with General Wilkinson, he informed this deponent that he had received additional information respecting the movements and designs of Burr by means of these agents, of whom he considered Bollman as the principal. In the course of these transactions, this deponent was employed by General Wilkinson in the copying of certain papers and documents, and preparing certain despatches for the general government, which the general intended to forward by the brig Thetis. While thus employed at the general's lodgings, this deponent has remarked, upon two different occasions, a person knock for admittance at a door with a window in it opposite the table where this deponent was sitting, who, this deponent was informed by General Wilkinson, was Doctor Bollman. Upon these occasions the general has suddenly risen from his seat, and accompanied this person in a number of turns up and down a balcony in the front of the house, apparently engaged in deep conversation. Upon the latter of these occasions the general, on

his return into the chamber, said to this deponent, "That is Doctor Bollman; his infatuation is truly extraordinary; he persists in his belief that I am with Burr, and has this moment shown me a letter from the latter, in which he says that he is to be at Natchez on the 20th December with 2,000 men, that 4,000 will follow in the course of a few days, and that he could, with the same ease, have procured double that number." General Wilkinson then observed, that he had obtained all the information he wanted, and that the affair would not be kept much longer a secret from the public.

When this deponent left the city of New Orleans, the inhabitants of that city were in a state of great alarm, and apprehended a serious attack from Mr. Burr and his confederates; this deponent understood that mercantile business was much embarrassed, and great fears were entertained of considerable commercial failures in consequence of the embargo which had been imposed; that General Wilkinson was taking strong measures of defence, and that 400 persons were then actually engaged in the fortifications of the city.

And further this deponent saith not.

JAMES L. DONALDSON.

Sworn to in open court.*

WILLIAM BRENT, Clerk.

January 26, 1807.

DEPOSITION OF LIEUTENANT W. WILSON.

I left New Orleans on my way to this city on the 15th of December last; at that time, and for some time preceding, the strongest apprehensions and belief universally prevailed among the inhabitants of that city, that Aaron Burr and his confederates had prepared an armed force, and were advancing to attack and plunder the city; in consequence of which the greatest alarms prevailed, a general stagnation of business ensued, and the danger was credited there as a matter of public notoriety; that Brigadier General Wilkinson, with the army of the United States, was at New Orleans, occupied in the most active military preparations for the defence of the place; repairing the forts, mounting cannon, collecting ammunition, &c. All under the firm persuasion and belief that such an attack was meditated, and about very speedily to take place, by the said Burr; this deponent knows that the general was decidedly of opinion, from the most satisfactory information, that the said Burr and his confederates were advancing with an armed force against this place.

And further this deponent saith not.

(Signed) WILLIAM WILSON.

Sworn to in open court, this 27th day of January, 1807.

WILLIAM BRENT, Clerk.

The deposition of Ensign W. C. Mead is precisely similar to that of Lieut. Wilson, except that the former states that he left New Orleans on the 19th of December.

APPENDIX.

Note (B.)

Opinion on the motion to introduce certain evidence in the trial of Aaron Burr, for treason, pronounced Monday, August 31.

The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them.

A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument, and a depth of research, by which the court has been greatly aided in forming the opinion it is about to deliver.

The testimony adduced on the part of the United States, to prove the overt act laid in the indictment, having shown, and the attorney for the United States having admitted, that the prisoner was not present when the act, whatever may be its character, was committed, and there being no reason to doubt but that he was at a great distance and in a different state, it is objected to the testimony offered on the part of the United States to connect him with those who committed the overt act, that such testimony is totally irrelevant, and must, therefore, be rejected.

The arguments in support of this motion respect in part the merits of the case as it may be supposed to stand independent of the pleadings, and in part as exhibited by the pleadings.

On the first division of the subject two points are made.

1st. That conformably to the constitution of the United States, no man can be convicted of treason who was not present when the war was levied.

2d. That if this construction be erroneous, no testimony can be received to charge one man with the overt acts of others, until those overt acts, as laid in the indictment, be proved to the satisfaction of the court.

The question which arises on the construction of the constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country and to their government, and requires the most temperate and the most deliberate consideration.

"Treason against the United States shall consist only in levying war against them."

What is the natural import of the words "levying war?" And who

may be said to levy it? Had their first application to treason been made by our constitution, they would certainly have admitted of some latitude of construction. Taken most literally, they are, perhaps, of the same import with the words raising or creating war, but as those who join after the commencement are equally the object of punishment, there would probably be a general admission, that the term also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would be considered as coming within the term, would be settled by a course of decisions, and it would be affirming boldly, to say that those only who actually constituted a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt, and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplied that army with provisions, or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him.

But the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country, whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term "levying war," is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edward III. from which it was borrowed.

It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not

lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench, and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect. It is to be regretted that they do not shed as much light on this part of the subject as is to be wished.

Coke does not give a complete definition of the term, but puts cases which amount to levying war. "An actual rebellion or insurrection," he says, "is a levying of war." In whom? Coke does not say whether in those only who appear in arms, or in all those who take part in the rebellion or insurrection by real open deed.

Hale, in treating on the same subject, puts many cases which shall constitute a levying of war, without which no act can amount to treason, but he does not particularize the parts to be performed by the different persons concerned in that war, which shall be sufficient to fix on each the guilt of levying it.

Foster says, "The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor." "Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, will *prima facie* make a man a traitor."

Foster does not say that he would be a traitor under the words of the statute, independent of the legal rule which attaches the guilt of the principal to an accessary, nor that his treason is occasioned by that rule. In England, this discrimination need not be made except for the purpose of framing the indictment, and, therefore, in the English books we do not perceive any effort to make it. Thus, surrendering a castle to rebels, being in confederacy with them, is said, by Hale and Foster, to be treason under the clause of levying war; but whether it be levying war in fact, or aiding those who levy it, is not said. Upon this point Blackstone is not more satisfactory. Although we may find among the commentators upon treason enough to satisfy the inquiry, what is a state of internal war, yet no precise information can be acquired from them, which would enable us to decide, with clearness, whether persons not in arms, but taking part in a rebellion, could be said to levy war independent of that doctrine which attaches to the accessary the guilt of his principal.

If in adjudged cases this question has been taken up and directly decided, the court has not seen those cases. The arguments which may be drawn from the form of the indictment, though strong, are not conclusive. In the precedent found in Tremaine, Mary Speake, who was indicted for furnishing provisions to the party of the Duke of Monmouth, is indicted for furnishing provisions to those who were levying war, not for levying war herself. It may correctly be argued, that had this act amounted to levying war, she would have been indicted for levying war, and the furnishing of provisions would have been laid as the

overt act. The court felt this when the precedent was produced. But the argument, though strong, is not conclusive, because, in England, the inquiry whether she had become a traitor by levying war, or by giving aid and comfort to those who were levying war, was unimportant, and because, too, it does not appear from the indictment that she was actually concerned in the rebellion, that she belonged to the rebel party, or was guilty of any thing further than a criminal speculation in selling them provisions.

It is not deemed necessary to trace the doctrine that in treason all are principals, to its source. Its origin is most probably stated correctly by Judge Tucker, in a work, the merit of which is with pleasure acknowledged. But if a spurious doctrine has been introduced into the common law, and has for centuries been admitted as genuine, it would require great hardihood in a judge to reject it. Accordingly, we find those of the English jurists, who seem to disapprove the principle, declaring that it is now too firmly settled to be shaken.

It is unnecessary to trace this doctrine to its source for another reason. The terms of the constitution comprise no question respecting principal and accessary, so far as either may be truly and in fact said to levy war. Whether in England a person would be indicted in express terms for levying war, or for assisting others in levying war, yet if, in correct and legal language, he can be said to have levied war, and if it has never been decided that the act would not amount to levying war, his case may, without violent construction, be brought within the letter and the plain meaning of the constitution.

In examining these words, the argument which may be drawn from felonies, as for example, from murder, is not more conclusive. Murder is the single act of killing with malice aforethought. But war is a complex operation composed of many parts, coöperating with each other. No one man, or body of men, can perform them all, if the war be of any continuance. Although, then, in correct and in law language, he alone is said to have murdered another who has perpetrated the fact of killing, or has been present aiding that fact, it does not follow that he alone can have levied war who has borne arms. All those who perform the various and essential military parts of prosecuting the war which must be assigned to different persons, may with correctness and accuracy be said to levy war.

Taking this view of the subject, it appears to the court, that those who perform a part in the prosecution of the war may correctly be said to levy war, and to commit treason under the constitution. It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it, or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine, that whatever would make a man an accessary in felony makes him a principal in treason, or are excluded, because that doctrine is inapplicable to the United States, the constitution having declared that treason shall consist only in levying war, and having made the proof of *overt acts* necessary to

conviction, is a question of vast importance, which it would be proper for the supreme court to take a fit occasion to decide, but which an inferior tribunal would not willingly determine, unless the case before them should require it.

It may now be proper to notice the opinion of the supreme court in the case of The United States against Bollman and Swartwout. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extrajudicial, and was delivered on a point not argued. This court is, therefore, required to depart from the principle there laid down.

It is true, that in that case, after forming the opinion that no treason could be committed, because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered, that the judges might act separately, and, perhaps, at the same time, on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them.

The court had employed some reasoning to show that without the actual embodying of men, war could not be levied. It might have been inferred from this, that those only who were so embodied could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the court proceeded to observe, "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This court is told that if this opinion be incorrect it ought not to be obeyed, because it was extrajudicial. For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous, but I would certainly use any means which the law placed in my power to carry the question again before the supreme court, for reconsideration, in a case in which it would directly occur and be fully argued.

The court which gave this opinion was composed of four judges. At the time I thought them unanimous, but I have since had reason to suspect that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussions, on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous it would have

been given by a majority of the judges. But should the three who were absent concur with that judge who was present, and who, perhaps, dissents from what was then the opinion of the court, a majority of the judges may overrule this decision. I should, therefore, feel no objection, although I then thought, and still think, the opinion perfectly correct, to carry the point, if possible, again before the supreme court, if the case should depend upon it.

In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued as if the supreme court had adopted the whole doctrine of the English books on the subject of accessaries to treason. But certainly such is not the fact. Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "perform a part," which will furnish the overt act, and they must be "leagued in the conspiracy." The person who comes within this description, in the opinion of the court, levies war. The present motion, however, does not rest upon this point; for, if under this indictment the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage.

2d. The second point involves the character of the overt act which has been given in evidence, and calls upon the court to declare whether that act can amount to levying war. Although the court ought now to avoid any analysis of the testimony which has been offered in this case, provided the decision of the motion should not rest upon it, yet many reasons concur in giving peculiar propriety to a delivery, in the course of these trials, of a detailed opinion on the question, what is levying war? As this question has been argued at great length, it may probably save much trouble to the counsel now to give that opinion.

In opening the case it was contended by the attorney for the United States, and has since been maintained on the part of the prosecution, that neither arms, nor the application of force or violence, are indispensably necessary to constitute the fact of levying war. To illustrate these positions several cases have been stated, many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which no observation will be made, the object of the assemblage was clearly treasonable; its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself; there was no necessity to rely upon information drawn from extrinsic sources, or in order to understand the fact, to pursue a course of intricate reasoning, and to conjecture motives. A force is supposed to be collected for an avowed treasonable object, in a condition to attempt that object, and to have commenced the attempt by moving towards it. I state these particulars, because, although the cases put may establish the doctrine they are intended to support, may prove that the absence of arms, or the failure to apply force to sensible objects by the actual commission of violence on those objects, may be

supplied by other circumstances, yet, they also serve to show that the mind requires those circumstances to be satisfied that war is levied.

Their construction of the opinion of the supreme court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself, and which is still entertained. If a rebel army, avowing its hostility to the sovereign power, should front that of the government, should march and countermarch before it, should manœuvre in its face, and should then disperse, from any cause whatever, without firing a gun, I confess I could not, without some surprise, hear gentlemen seriously contend that this could not amount to an act of levying war. A case equally strong may be put with respect to the absence of military weapons. If the party be in a condition to execute the purposed treason without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued that no adjudged case can be produced from the English books where actual violence has not been committed. Suppose this were true. No adjudged case has, or, it is believed, can be, produced from those books in which it has been laid down, that war cannot be levied without the actual application of violence to external objects. The silence of the reporters on this point may be readily accounted for. In cases of actual rebellion against the government, the most active and influential leaders are generally most actively engaged in the war, and as the object can never be to extend punishment to extermination, a sufficient number are found among those who have committed actual hostilities, to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting-houses, where the direct and avowed object is not the destruction of the sovereign power, some act of violence might be generally required to give the crime a sufficient degree of malignity to convert it into treason, to render the guilt of any individual unequivocal.

But Vaughan's Case is a case where there was no real application of violence, and where the act was adjudged to be treason. Gentlemen argue that Vaughan was only guilty of adhering to the king's enemies, but they have not the authority of the court for so saying. The judges unquestionably treat the cruising of Vaughan as an overt act of levying war.

The opinions of the best elementary writers concur in declaring, that where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. These opinions are contradicted by no adjudged case, and are supported by Vaughan's Case. This court is not inclined to controvert them.

But although, in this respect, the opinion of the supreme court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to in a very essential point in which it is said to have been misconceived by others.

The opinion, I am informed, has been construed to mean that any assemblage whatever for a treasonable purpose, whether in force, or not in force, whether in a condition to use violence, or not in that condition, is a levying of war. It is this construction, which has not, indeed, been expressly advanced at the bar, but which is said to have been adopted elsewhere, that the court deems it necessary to examine.

Independent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in the declaration that war could not be levied without the employment and exhibition of force. War is an appeal from reason to the sword, and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words, but the actual going to war is a fact which is to be proved by open deed. The end is to be effected by force, and it would seem that in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it.

But the term having been adopted by our constitution, must be understood in that sense in which it was universally received in this country, when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term.

Lord Coke says, that levying war against the king was treason at the common law. "A compassing or conspiracy to levy war," he adds, "is no treason, for there must be a levying of war in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government, but to effect some general object by force. The terms he employs in stating these cases, are such as indicate an impression on his mind, that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say, "An actual rebellion, or insurrection, is a levying of war within this act." "If any with strength and weapons invasive and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king." These cases are put to illustrate what he denominates "a war in fact." It is not easy to conceive "an actual invasion or insurrection" unconnected with force, nor can "a castle or fort be defended with strength and weapons invasive and defensive," without the employment of actual force. It would seem, then, to have been the opinion of Lord Coke, that to levy war there must be an assemblage of men in a condition, and with an intention, to employ force. He certainly puts no case of a different description.

Lord Hale says, (149. 6.) "What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes a levying of war; for then every riot would be treason," &c. "but it must be such an assembly as carries with it *speciem belli*, the appearance of war, as if they ride or march, *vexillis explicatis*,

with colours flying, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war, which circumstances are so various that it is hard to describe them all particularly."

"Only the general expressions in all the indictments of this nature that I have seen are *more guerrino arraiati*, arrayed in a warlike manner."

He afterwards adds, "If there be a war levied as is above declared, viz. an assembly arrayed in warlike manner, and so in the posture of war for any treasonable attempt, it is *bellum levatum*, but not *percussum*."

It it obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to suggest, that the apparatus of war is necessary, has been very justly combated by an able judge who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly should be in a posture of war for any treasonable attempt, has ever been denied. Hawk. c. 17. s. 23. says, "That not only those who rebel against the king, and take up arms to dethrone him, but also in many other cases, those who in a violent and forcible manner withstand his lawful authority, are said to levy war against him, and, therefore, those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him."

The cases put by Hawkins are all cases of actual force and violence. "Those who rebel against the king and take up arms to dethrone him;" in many other cases those "who in a violent and forcible manner withstand his lawful authority." "Those that hold a fort or castle against his forces, or keep together armed numbers of men against his express command."

These cases are obviously cases of force and violence.

Hawkins next proceeds to describe cases in which war is understood to be levied under the statute, although it was not directly made against the government. This Lord Hale terms an interpretative or constructive levying of war, and it will be perceived that he puts no case in which actual force is dispensed with.

"Those also," he says, "who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt *with force* to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority which he by public justice ought to do, which manifestly tends to a downright rebellion. As where great numbers *by force* attempt to remove certain persons from the king," &c. The cases here put by Hawkins, of a constructive levying of war, do in terms require force as a constituent part of the description of the offence.

Judge Foster, in his valuable treatise on treason, states the opinion which has been quoted from Lord Hale, and differs from that writer so far as the latter might seem to require swords, drums, colours, &c. what he terms the pomp and pageantry of war, as essential circumstances to constitute the fact of levying war. In the cases of Damaree and Purchase, he says, "The want of those circumstances weighed nothing with the court, although the prisoners' counsel insisted much on that matter." But he adds, "The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect. *Furor arma ministrat.*"

It is apparent that Judge Foster here alludes to an assemblage in force, or, as Lord Hale terms it, "in a warlike posture;" that is, in a condition to attempt or proceed upon the treason which had been contemplated. The same author afterwards states at large the cases of Damaree and Purchase, from 8th State Trials, and they are cases where the insurgents not only assembled in force, in the posture of war, or in a condition to execute the treasonable design, but they did actually carry it into execution, and did resist the guards who were sent to disperse them.

Judge Foster states, s. 4. all insurrections to effect certain innovations of a public and general concern *by an armed force*, to be, in construction of law, high treason within the clause of levying war.

The cases put by Foster of constructive levying of war, all contain, as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law in a case of actual levying war, that is, where the war is intended directly against the government.

He says, s. 9. "An assembly armed and arrayed in a warlike manner for a treasonable purpose, is *bellum levatum*, though not *bellum percussum*. Listing and marching are sufficient overt acts without coming to a battle or action. So cruising on the king's subjects under a French commission, France being then at war with us, was held to be adhering to the king's enemies, though no other act of hostility be proved."

"An assembly armed and arrayed in a warlike manner for any treasonable purpose" is certainly in a state of force; in a condition to execute the treason for which they assembled. The words "enlisting and marching," which are overt acts of levying war, do, in the arrangement of the sentence, also imply a state of force, though that state is not expressed in terms, for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened, they are "without coming to a battle or action." "If men be enlisted and march," (that is, if they march prepared for battle, or in a condition for action, for marching is a technical term applied to the movement of a military corps,) it is an overt act of levying war, though they do not come to a battle or action. This exposition is rendered the stronger by what

seems to be put in the same sentence as a parallel case with respect to adhering to an enemy. It is cruising under a commission from an enemy, without committing any other act of hostility. Cruising is the act of sailing in warlike form, and in a condition to assail those of whom the cruiser is in quest.

This exposition, which seems to be that intended by Judge Foster, is rendered the more certain by a reference to the case in the State Trials from which the extracts are taken. The words used by the chief justice are, "When men form themselves into a body, and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed, "Intending to levy war is not treason, unless a war be actually levied." To this the chief justice answered, "Is it not actually levying of war, if they actually provide arms and levy men, and in a warlike manner set out and cruise, and come with a design to destroy our ships?" Mr. Phipps still insisted, "it would not be an actual levying of war unless they committed some act of hostility." "Yes, indeed," said the chief justice, "the going on board and being in a posture to attack the king's ships." Mr. Baron Powis added, "But for you to say that because they did not actually fight it is not a levying of war, is it not plain what they did intend? That they came with that intention, that they came in that posture, that they came armed, and had guns and blunderbusses, and surrounded the ship twice; they came with an armed force, that is a strong evidence of the design."

The point insisted on by counsel in the case of Vaughan, as in this case, was, that war could not be levied without actual fighting. In this the counsel was very properly overruled; but it is apparent that the judges proceeded entirely on the idea that a warlike posture was indispensable to the fact of levying war.

Judge Foster proceeds to give other instances of levying war. "Attacking the king's forces in opposition to his authority upon a march, or in quarters, is levying war." "Holding a castle or fort against the king or his forces, if *actual force be used in order to keep possession*, is levying war. But a bare detainer, as suppose by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason."

The whole doctrine of Judge Foster on this subject, seems to demonstrate a clear opinion that a state of force and violence, a posture of war, must exist to constitute technically, as well as really, the fact of levying war.

Judge Blackstone seems to concur with his predecessors. Speaking of levying war, he says, "This may be done by taking arms not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man or set of men to interfere *forcibly* in matters of such high importance,"

He proceeds to give examples of levying war, which show that he contemplated actual force as a necessary ingredient in the composition of this crime.

It would seem, then, from the English authorities, that the words "levying war," have not received a technical, different from their natural meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practise hostility.

Several judges of the United States have given opinions at their circuits on this subject, all of which deserve and will receive the particular attention of this court.

In his charge to the grand jury, when John Fries was indicted, in consequence of a forcible opposition to the direct tax, Judge Iredell is understood to have said, "I think I am warranted in saying, that if in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the congress of the United States altogether, any *forcible opposition* calculated to carry that intention into effect was a levying of war against the United States, and of course an act of treason." To levy war, then, according to this opinion of Judge Iredell, required the actual exertion of force.

Judge Paterson, in his opinions delivered in two different cases, seems not to differ from Judge Iredell. He does not, indeed, precisely state the employment of force as necessary to constitute a levying of war, but in giving his opinion in cases in which force was actually employed, he considers the crime in one case as dependent on the intention, and in the other case he says, "Combining these facts with this design," (that is, combining actual force with a treasonable design,) "the crime is high treason."

Judge Peters has also indicated the opinion that force was necessary to constitute the crime of levying war.

Judge Chase has been particularly clear and explicit. In an opinion which he appears to have prepared on great consideration, he says, "The court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the quantum of the force employed neither increases nor diminishes the crime; whether by one hundred or one thousand persons, is wholly immaterial.

"The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason; unless combined with an attempt to carry such combination or conspiracy into execution: some actual force or violence must be used in pursuance of such design to levy war; but that it is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying of war."

In various parts of the opinion delivered by Judge Chase, in the case

of Fries, the same sentiments are to be found. It is to be observed, that these judges are not content that troops should be assembled in a condition to employ force; according to them, some degree of force must have been actually employed.

The judges of the United States, then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war, than has been required by the English books. Our judges seem to have required the actual exercise of force, the actual employment of some degree of violence. This, however, may be, and probably is, because in the cases in which their opinions were given, the design not having been to overturn the government, but to resist the execution of a law, such an assemblage would be sufficient for the purpose, as to require the actual employment of force to render the object unequivocal.

But it is said, all these authorities have been overruled by the decision of the supreme court in the case of the United States against Swartwout and Bollman.

If the supreme court have indeed extended the doctrine of treason further than it has heretofore been carried by the judges of England, or of this country, their decision would be submitted to. At least, this court could go no further than to endeavour again to bring the point directly before them. It would, however, be expected that an opinion which is to overrule all former precedents, and to establish a principle never before recognised, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have expressly declared, that any assemblage of men whatever, who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the supreme court. The foundation on which this argument rests is the omission of the court to state, that the assemblage which constitutes the fact of levying war ought to be in force, and some passages which show that the question respecting the nature of the assemblage was not in the mind of the court when the opinion was drawn, which passages are mingled with others, which at least show that there was no intention to depart from the course of the precedents in cases of treason by levying war.

Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the United States against Bollman and Swartwout, there was no evidence that even two men had ever met for the purpose of executing the plan, in which those persons were charged with having participated. It was, therefore, sufficient for the court to say, that unless men were assembled, war could not be levied. That case was decided by this declaration. The court might, indeed, have defined the species of assemblage

which would amount to levying of war; but, as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference to the case itself; and the mere omission to state that a particular circumstance was necessary to the consummation of the crime, ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles, without a direct declaration to that effect. After these preliminary observations the court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question is, "To constitute that specific crime for which the prisoner now before the court has been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiracy to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Although it is not expressly stated that the assemblage of men for the purpose of carrying into operation the treasonable intent, which will amount to levying war, must be an assemblage in force, yet it is fairly to be inferred from the context, and nothing like dispensing with force appears in this paragraph. The expressions are, "To constitute the crime, war must be actually levied." A conspiracy to levy war is spoken of as "a conspiracy to subvert by force the government of our country." Speaking in general terms of an assemblage of men for this, or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our country, and amounting to a levying of war, should be an assemblage in force.

In a subsequent paragraph, the court says, "It is not the intention of the court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled in order to effect by force a treasonable purpose, all those who perform any part, however minute, &c. and who are actually leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war."

The observations made on the preceding paragraph apply to this. "A body of men actually assembled, in order to effect by force a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion that they were assembled for the particular purpose; an assemblage to constitute an actual levying of war, should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose.

This explanation, which is believed to be the natural, certainly not a strained, explanation of the words, derives some additional aid from the

terms in which the paragraph last quoted commences. "It is not the intention of the court to say that no individual can be guilty of treason who has not appeared in arms against his country." These words seem to obviate an inference which might otherwise have been drawn from the preceding paragraph. They indicate, that in the mind of the court the assemblage stated in that paragraph was an assemblage in arms. That the individuals who composed it had appeared in arms against their country. That is, in other words, that the assemblage was a military, a warlike assemblage.

The succeeding paragraph in the opinion relates to a conspiracy, and serves to show that force and violence were in the mind of the court, and that there was no idea of extending the crime of treason by construction beyond the constitutional definition which had been given of it.

Returning to the case actually before the court, it is said, "A design to overturn the government of the United States in New Orleans *by force*, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States."

Now what could reasonably be said to be an assemblage of a body of men for the purpose of overturning the government of the United States in New Orleans by force? Certainly an assemblage in force; an assemblage prepared and intending to act with force; a military assemblage.

The decisions theretofore made by the judges of the United States, are then declared to be in conformity with the principles laid down by the supreme court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the court? The opinions of Judge Paterson and Judge Iredell are said "to imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself." This observation certainly indicates that the necessity of an assemblage of men was the particular point the court meant to establish, and that the idea of force was never separated from this assemblage.

The opinion of Judge Chase is next quoted with approbation. This opinion, in terms, requires the employment of force.

After stating the verbal communications said to have been made by Mr. Swartwout to General Wilkinson, the court says, "If these words import that the government of New Orleans was to be revolutionized by force, although merely as a step to, or a mean of, executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war."

The words "any assemblage of men," if construed to affirm that any two or three of the conspirators who might be found together after this plan had been formed, would be the act of levying war, would certainly be misconstrued. The sense of the expression "any assemblage of

men," is restricted by the words "for this purpose." Now could it be in the contemplation of the court that a body of men would assemble for the purpose of revolutionizing New Orleans by force, who should not themselves be in force?

After noticing some difference of opinion among the judges respecting the import of the words said to have been used by Mr. Swartwout, the court proceeds to observe, "But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him."

Could the court have conceived "an open assemblage," "for the purpose of overturning the government of New Orleans by force," "to be only equivalent to a secret furtive assemblage without the appearance of force."

After quoting the words of Mr. Swartwout, from the affidavit, in which it was stated that Mr. Burr was levying an army of 7,000 men, and observing that the treason to be inferred from these words would depend on the intention with which it was levied, and on the progress which had been made in levying it, the court say, "The question, then, is, whether this evidence proves Colonel Burr to have advanced so far in levying an army as actually to have assembled them."

Actually to assemble an army of 7,000 men is unquestionably to place those who are so assembled in a state of open force.

But as the mode of expression used in this passage might be misconstrued so far as to countenance the opinion that it would be necessary to assemble the whole army in order to constitute the fact of levying war, the court proceeds to say, "It is argued that since it cannot be necessary that the whole 7,000 men should be assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime."

"This position is correct with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage; and, therefore, this evidence should make the fact unequivocal.

"The travelling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

The position here stated by the counsel for the prosecution is, that the army "commencing its march by detachments to the place of rendezvous, (that is, of the army,) must be sufficient to constitute the crime."

This position is not admitted by the court to be universally correct. It is said to be "correct with some qualification." What is that qualification?

"The travelling of individuals to the place of rendezvous" (and by this term is not to be understood one individual by himself, but several individuals, either separately or together, but not in military form) "would, perhaps, not be sufficient." Why not sufficient? "Because," says the court, "this would be an equivocal act, and has no warlike appearance." The act, then, should be unequivocal, and should have a warlike appearance. It must exhibit, in the words of Sir Mathew Hale, *speciem belli*, the appearance of war.

This construction is rendered in some measure necessary when we observe that the court is qualifying the position, "That the army commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime." In qualifying this position they say, "The travelling of individuals would, perhaps, not be sufficient." Now, a solitary individual travelling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The court, therefore, must have contemplated several individuals travelling together; and the words being used in reference to the position they were intended to qualify, would seem to indicate the distinction between the appearances attending the usual movement of a company of men for civil purposes, and that military movement which might, in correct language, be denominated "marching by detachments."

The court then proceeded to say, "The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

It is obvious, from the context, that the court must have intended to state a case which would in itself be unequivocal, because it would have a warlike appearance. The case stated is that of distinct bodies of men assembling at different places, and marching from these places of partial to a place of general rendezvous. When this has been done, an assemblage is produced which would in itself be unequivocal. But when is it done? what is the assemblage here described? The assemblage formed of the different bodies of partial at a general place of rendezvous. In describing the mode of coming to this assemblage, the civil term "travelling" is dropped, and the military term "marching" is employed. If this was intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a general place of rendezvous composed of bodies of men who had previously assembled at places of partial rendezvous. But this is not intended as a definition, for clearly if there should be no places of partial rendezvous, if troops should embody in the first instance, in great force for the purpose of subverting the government by violence, the act would be unequivocal, it would have a warlike appearance, and it would, according to the opinion of the supreme court, properly construed, and according to the English authorities, amount to levying war. But this, though not a definition, is put as an example; and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design, plainly proved, should assemble in warlike appearance at places of partial rendezvous, and should *march* from those places to a place of general rendezvous, it is difficult

to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force. At any rate, a court in stating generally such a military assemblage as would amount to levying war, and having a case before them in which there was no assemblage whatever, cannot reasonably be understood, in putting such an example, to dispense with those appearances of war which seem to be required by the general current of authorities. Certainly they ought not to be so understood when they say, in express terms, that "it is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not already within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

After this analysis of the opinion of the supreme court, it will be observed, that the direct question, whether an assemblage of men which might be construed to amount to a levying of war, must appear in force or in military form, was not in argument or in fact before the court, and does not appear to have been in terms decided. The opinion seems to have been drawn without particularly adverting to this question, and, therefore, upon a transient view of particular expressions, might inspire the idea that a display of force, that appearances of war, were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investigation of this opinion, although the terms force and violence are not employed as descriptive of the assemblage, such requisites are declared to be indispensable as can scarcely exist without the appearance of war, and the existence of real force. It is said that war must be levied in fact; that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object; that it must not be an equivocal act, without a warlike appearance; that it must be an open assemblage for the purpose of force. In the course of this opinion, decisions are quoted and approved, which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations with the idea that the supreme court considered a secret unarmed meeting, although that meeting be of conspirators, and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force or in warlike form, they express themselves so as to show that this idea was never discarded, and they use terms which cannot be otherwise satisfied.

The opinion of a single judge certainly weighs as nothing if opposed to that of the supreme court; but if he was one of the judges who assisted in framing that opinion, if while the impression under which it was framed was yet fresh upon his mind, he delivered an opinion on the same testimony, not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself.

To the judge before whom the charge against the prisoner at the bar was first brought, the same testimony was offered with that which had been exhibited before the supreme court, and he was required to give an opinion in almost the same case. Upon this occasion, he said, "War can only be levied by the employment of actual force. Troops must be embodied; men must be assembled in order to levy war." Again, he observed, "The fact to be proved in this case, is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction, and numbers must witness it."

It is not easy to doubt what kind of assemblage was in the mind of the judge who used these expressions, and it is to be recollected that he had just returned from the supreme court, and was speaking on the very facts on which the opinion of that court was delivered.

The same judge, in his charge to the grand jury who found this bill, observed, "To constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced by engaging the military force of the United States, or that measures of violence against the government shall have been carried into execution. But levying war is a fact, in the constitution of which force is an indispensable ingredient. Any combination to subvert, by force, the government of the United States, violently to dismember the union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war, and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling of men for the purpose of executing the treasonable design which was previously conceived, it amounts to levying of war. It has been held that arms are not essential to levying war provided the force assembled be sufficient to attain, or perhaps to justify attempting, the object without them." This paragraph is immediately followed by a reference to the opinion of the supreme court.

It requires no commentary upon these words, to show that, in the opinion of the judge who uttered them, an assemblage of men which should constitute the fact of levying war must be an assemblage in force, and that he so understood the opinion of the supreme court. If in that opinion there may be found in some passages, a want of precision, and indefiniteness of expression, which has occasioned it to be differently understood by different persons, that may well be accounted for, when it is recollected that in the particular case there was no assemblage whatever. In expounding that opinion the whole should be taken together, and in reference to the particular case in which it was delivered. It is, however, not improbable that the misunderstanding has arisen from this circumstance. The court, unquestionably, did not consider arms as an indispensable requisite to levying war; an assemblage adapted to the object might be in a condition to effect or to attempt it without them. Nor did the court consider the actual applica-

tion of the force to the object, at all times, an indispensable requisite; for an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought too hastily, that the nature of the assemblage was unimportant, and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

It has been thought proper to discuss this question at large, and to review the opinion of the supreme court, although this court would be more disposed to leave the question of fact, whether an overt act of levying war was committed on Blennerhassett's island to the jury under this explanation of the law, and to instruct them, that unless the assemblage on Blennerhassett's island was an assemblage in force; was a military assemblage in a condition to make war, it was not a levying of war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case.

Before leaving the opinion of the supreme court entirely on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual, entering a boat and sailing down the Ohio, for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war? And ought not the supreme court, when speaking of an assemblage for the purpose of effecting a treasonable object by force, be understood to indicate an assemblage exhibiting the appearance of force.

The definition of the attorney for the United States deserves notice in this respect. It is, "When there is an assemblage of men convened for the purpose of effecting by force a treasonable object, which force is meant to be employed before the assemblage disperses, this is treason."

To read this definition without adverting to the argument, we should infer that the assemblage was itself to effect by force the treasonable object, not to join itself to some other bodies of men, and then to effect the object by their combined force. Under this construction it would be expected the appearance of the assemblage would bear some proportion to the object, and would indicate the intention. At any rate, that it would be an assemblage in force. This construction is most certainly not that which was intended, but it serves to show that gene-

ral phrases must always be understood in reference to the subject matter, and to the general principles of law.

On that division of the subject which respects the merits of the case connected with the pleadings, two points are also made.

1st. That this indictment, having charged the prisoner with levying war on Blennerhassett's island, and containing no other overt act, cannot be supported by proof that war was levied at that place by other persons, in the absence of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy.

2dly. That admitting such an indictment could be supported by such evidence, the previous conviction of some person who committed the act which is said to amount to levying war, is indispensable to the conviction of a person who advised or procured that act.

As to the first point, the indictment contains two counts, one of which charges that the prisoner, with a number of persons unknown, levied war on Blennerhassett's island, in the county of Wood, in the district of Virginia; and the other adds the circumstance of their proceeding from that island down the river, for the purpose of seizing New Orleans by force.

In point of fact, the prisoner was not on Blennerhassett's island, nor in the county of Wood, nor in the district of Virginia.

In considering this point the court is led first to inquire whether an indictment for levying war must specify an overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance.

The place in which a crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defence. That, at common law, an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this, it is sufficient to refer to Hawkins, b. 2. c. 25. sect. 84. and c. 23. sect. 91. This necessity is rendered the stronger by the constitutional provision that the offender "shall be tried in the state and district wherein the crime shall have been committed," and by the act of congress which requires that twelve petty jurors at least shall be summoned from the county where the offence was committed.

A description of the particular manner in which the war was levied seems also essential to enable the accused to make his defence. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. The general doctrine on the subject of indictments is full to this point. Foster, p. 149. speaking of the treason of compassing the king's death, says, "From what has been said it followeth that in every indictment for this species of treason, and indeed

for levying war and adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defence."

In p. 220. Foster repeats this declaration. It is also laid down in Hawk. b. 8. c. 17. sect. 29. 1 Hale, 121. 1 East, 116. and by the other authorities cited, especially Vaughan's Case. In corroboration of this opinion, it may be observed, that treason can only be established by the proof of overt acts, and that by the common law as well as by the statute of 7 of William III. those overt acts only which are charged in the indictment can be given in evidence, unless, perhaps, as corroborative testimony after the overt acts are proved. That clause in the constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defence.

It seems, then, to be perfectly clear, that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion.

If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.

All the authorities which require an overt act, require also that this overt act should be proved. The decision in Vaughan's Case is particularly in point. Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it.

But it is contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's island, and was, at the time, at a great distance, and in a different state, he was yet legally present, and, therefore, may properly be charged in the indictment as being present in fact.

It is, therefore, necessary to inquire whether in this case the doctrine of constructive presence can apply.

It is conceived by the court to be possible that a person may be concerned in a treasonable conspiracy, and yet be legally, as well as actually absent, while some one act of the treason is perpetrated. If a rebellion should be so extensive as to spread through every state in the union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed, too violent to be made without clear authority, to presume that even the chief of the rebel army was legally present at every such overt act. If the main rebel army with the chief at its head, should be prosecuting war at one extremity of our territory, say in New Hampshire, if this chief should be there captured and sent to the other extremity for the purpose of

trial, if his indictment, instead of alleging an overt act which was true in point of fact, should allege that he had assembled some small party, which, in truth, he had not seen, and had levied war by engaging in a skirmish in Georgia at a time when in reality he was fighting a battle in New Hampshire, if such evidence would support such an indictment, by the fiction that he was legally present though really absent, all would ask to what purpose are those provisions in the constitution which direct the place of trial, and ordain that the accused shall be informed of the nature and cause of the accusation?

But that a man may be legally absent who has counselled or procured a treasonable act, is proved by all those books which treat upon the subject, and which concur in declaring that such a person is a principal traitor, not because he was legally present, but because in treason all are principals. Yet the indictment, upon general principles, would charge him according to the truth of the case. Lord Coke says, "If many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all." Why? Because all were legally present when the war was levied? No. "For in treason," continues Lord Coke, "all be principals, and war is levied." In this case the indictment, reasoning from analogy, would not charge that the absent conspirators were present, but would state the truth of the case. If the conspirator had done nothing which amounted to levying of war, and if, by our constitution, the doctrine that an accessary becomes a principal be not adopted, in consequence of which the conspirator could not be condemned under an indictment stating the truth of the case, it would be going very far to say that this defect, if it be termed one, may be cured by an indictment stating the case untruly.

This doctrine of Lord Coke has been adopted by all subsequent writers; and it is generally laid down in the English books, that whatever will make a man an accessary in felony, will make him a principal in treason; but it is nowhere suggested that he is by construction to be considered as present when in point of fact he was absent.

Foster has been particularly quoted, and certainly he is precisely in point. "It is well known," says Foster, "that in the language of the law there are no accessaries in high treason; all are principals. Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessary before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in treason. The cases of incitement and aid are cases put as examples of a man's becoming a principal in treason, not because he was legally present, but by force of that maxim in the common law, that whatever will render a man an accessary at common law will render him a principal in treason. In other passages the words "command" or "procure" are used to indicate the same state of things, that is, a treasonable assemblage produced by a man who is not himself in that assemblage.

In point of law, then, the man who incites, aids, or procures a trea-

onable act, is not, merely in consequence of that incitement, aid or procurement, legally present when that act is committed.

If it does not result from the nature of the crime, that all who are concerned in it are legally present at every overt act, then each case depends upon its own circumstances, and to judge how far the circumstances of any case can make him legally present who is in fact absent, the doctrine of constructive presence must be examined.

Hale, in his 1st vol. p. 615. says, "Regularly no man can be a principal in felony unless he be present." In the same page he says, "An accessary *before*, is he that being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony." The books are full of passages which state this to be the law. Foster, in showing what acts of concurrence will make a man a principal, says, "He must be present at the perpetration, otherwise he can be no more than an accessary before the fact."

These strong distinctions would be idle, at any rate they would be inapplicable to treason, if they were to be entirely lost in the doctrine of constructive presence.

Foster adds, p. 349. "When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passeth." The terms used by Foster are such as would be employed by a man intending to show the necessity that the absent person should be near at hand, although, from the nature of the thing, no precise distance could be marked out. An inspection of the cases from which Foster drew this general principle will serve to illustrate it. (See Hale, 439.) In all these cases, put by Hale, the whole party set out together to commit the very fact charged in the indictment, or to commit some other unlawful act, in which they are all to be personally concerned at the same time and place, and are, at the very time when the criminal fact is committed, near enough to give actual personal aid and assistance to the man who perpetrated it. Hale, in p. 449. giving the reason for the decision in the case of the Lord Dacres, says, "They all came with an intent to steal the deer, and, consequently, the law supposes that they came all with the intent to oppose all that should hinder them in that design." The original case says this was their resolution. This opposition would be a personal opposition. This case, even as stated by Hale, would clearly not comprehend any man who entered into the combination, but who, instead of going to the park where the murder was committed, should not set out with the others, should go to a different park, or should even lose his way. See Hale, 534.

In both the cases here stated, the persons actually set out together, and were near enough to assist in the commission of the fact. That in the case of Pudsy the felony was, as stated by Hale, a different felony from that originally intended, is unimportant in regard to the particular principle now under consideration, so far as respected distance; as respected capacity to assist in case of resistance, it is the same as if the

robbery had been that which was originally designed. The case in the original report shows that the felony committed was in fact in pursuance of that originally designed. Foster, 350. plainly supposes the same particular design, not a general design composed of many particular distinct facts. He supposes them to be coöperating with respect to that particular design. This may be illustrated by a case which is perhaps common. Suppose a band of robbers confederated for the general purpose of robbing. They set out together, or in parties, to rob a particular individual, and each performs the part assigned to him. Some ride up to the individual and demand his purse, others watch out of sight to intercept those who might be coming to assist the man on whom the robbery is to be committed. If murder or robbery actually take place, all are principals, and all, in construction of law, are present. But suppose they set out at the same time, or at different times, by different roads, to attack and rob different individuals or different companies; to commit distinct acts of robbery. It has never been contended that those who committed one act of robbery, or who failed altogether, were constructively present at the act of those who were associated with them in the common object of robbery, who were to share the plunder, but who did not assist at the particular fact. They do indeed belong to the general party, but they are not of the particular party which committed this fact. Foster concludes this subject by observing, that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary." That is, at the particular fact which is charged, he must be ready to render assistance to those who are committing that particular fact; he must, as is stated by Hawkins, be ready to give immediate and direct assistance.

All the cases to be found in the books go to the same point. Let them be applied to that under consideration.

The whole treason laid in this indictment is the levying of war in Blennerhassett's island, and the whole question to which the inquiry of the court is now directed is, whether the prisoner was legally present at that fact.

I say this is the whole question, because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged; it is as evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.

The counsel for the prosecution have charged those engaged in the defence with considering the overt act as the treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle, that though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties. And the only division

of that point, if the expression be allowed, which the court is now examining, is the constructive presence of the prisoner at the fact charged.

To return, then, to the application of the cases.

Had the prisoner set out with the party from Beaver for Blennerhassett's island, or, perhaps, had he set out for that place, though not from Beaver, and had arrived in the island, he would have been present at the fact; had he not arrived in the island, but had taken a position near enough to coöperate with those on the island, to assist them in any act of hostility, or to aid them if attacked, the question whether he was constructively present would be a question compounded of law and fact, which would be decided by the jury, with the aid of the court, so far as respected the law. In this case the accused would have been of the particular party assembled on the island, and would have been associated with them in the particular act of levying war said to have been committed on the island.

But if he was not with the party at any time before they reached the island; if he did not join them there, or intend to join them there; if his personal coöperation in the general plan was to be afforded elsewhere, at a great distance, in a different state; if the overt acts of treason to be performed by him were to be distinct overt acts, then he was not of the particular party assembled at Blennerhassett's island, and was not constructively present, aiding and assisting in the particular act which was there committed.

The testimony on this point, so far as it has been delivered, is not equivocal. There is not only no evidence that the accused was of the particular party which assembled on Blennerhassett's island, but the whole evidence shows he was not of that party.

In felony, then, admitting the crime to have been completed on the island, and to have been advised, procured, or commanded by the accused, he would have been incontestably an accessary, and not a principal.

But in treason, it is said, the law is otherwise, because the theatre of action is more extensive.

This reasoning applies in England as strongly as in the United States. While in '15 and '45 the family of Stuart sought to regain the crown they had forfeited, the struggle was for the whole kingdom; yet no man was ever considered as legally present at one place, when actually at another; or as aiding in one transaction, while actually employed in another.

With the perfect knowledge that the whole nation may be the theatre of action, the English books unite in declaring, that he who counsels, procures, or aids treason, is guilty accessorily, and solely in virtue of the common law principle, that what will make a man an accessary in felony makes him a principal in treason. So far from considering a man as constructively present at every overt act of the general treason in which he may have been concerned, the whole doctrine of the books limits the proof against him to those particular overt acts of levying war with which he is charged.

What would be the effect of a different doctrine? Clearly that which has been stated. If a person levying war in Kentucky may be said to be constructively present and assembled with a party carrying on war in Virginia, at a great distance from him, then he is present at every overt act performed anywhere; he may be tried in any state on the continent, where any overt act has been committed; he may be proved to be guilty of an overt act laid in the indictment in which he had no personal participation, by proving that he advised it, or that he committed other acts.

This is, perhaps, too extravagant to be in terms maintained. Certainly it cannot be supported by the doctrines of the English law.

The opinion of Judge Paterson, in Mitchell's Case, has been cited on this point. 2 Dall. 348.

The indictment is not specially stated; but from the case as reported, it must have been either general for levying war in the county of Alleghany, and the overt act laid must have been the assemblage of men and levying of war in that county; or it must have given a particular detail of the treasonable transactions in that county. The first supposition is the most probable; but let the indictment be in the one form or the other, and the result is the same. The facts of the case are, that a large body of men, of whom Mitchell was one, assembled at Braddock's field, in the county of Alleghany, for the purpose of committing acts of violence at Pittsburgh. That there was also an assemblage at a different time at Couches fort, at which the prisoner also attended. The general and avowed object of that meeting was to concert measures for resisting the execution of a public law. At Couches fort the resolution was taken to attack the house of the inspector, and the body there assembled marched to that house and attacked it. It was proved by the competent number of witnesses, that he was at Couches fort armed; that he offered to reconnoitre the house to be attacked; that he marched with the insurgents towards the house; that he was with them after the action, attending the body of one of his comrades who was killed in it; one witness swore positively that he was present at the burning of the house, and a second witness said that "it ran in his head that he had seen him there." That a doubt should exist in such a case as this, is strong evidence of the necessity that the overt act should be unequivocally proved by two witnessess.

But what was the opinion of the judge in this case? Couches fort and Neville's house being in the same county, the assemblage having been at Couches fort, and the resolution to attack the house having been there taken, the body having for the avowed purpose moved in execution of that resolution towards the house to be attacked, he inclined to think that the act of marching was in itself levying war. If it was, then the overt act laid in the indictment was consummated by the assemblage at Couches, and the marching from thence; and Mitchell was proved to be guilty by more than two positive witnesses. But without deciding this to be the law, he proceeded to consider the meet-

ing at Couches, the immediate marching to Neville's house, and the attack and burning of the house, as one transaction. Mitchell was proved by more than two positive witnesses to have been in that transaction, to have taken an active part in it, and the judge declared it to be unnecessary that all should have seen him at the same time and place.

But suppose not a single witness had proved Mitchell to have been at Couches, or on the march, or at Neville's. Suppose he had been at the time notoriously absent in a different state. Can it be believed by any person who observes the caution with which Judge Paterson required the constitutional proof of two witnesses to the same overt act, that he would have said Mitchell was constructively present, and might, on that straining of a legal fiction, be found guilty of treason? Had he delivered such an opinion, what would have been the language of this country respecting it? Had he given this opinion, it would have required all the correctness of his life to strike his name from that bloody list in which the name of Jefferies is enrolled.

But to estimate the opinion in Mitchell's Case, let its circumstances be transferred to Burr's Case. Suppose the body of men assembled in Blennerhassett's island had previously met at some other place in the same county, and that Burr had been proved to be with them by four witnesses; that the resolution to march to Blennerhassett's island for a treasonable purpose had been there taken; that he had been seen on the march with them; that one witness had seen him on the island; that another thought he had seen him there; that he had been seen with the party directly after leaving the island; that this indictment had charged the levying of war in Wood county generally; the cases would then have been perfectly parallel, and the decisions would have been the same.

In conformity with principle and with authority, then, the prisoner at the bar was neither legally nor actually present at Blennerhassett's island; and the court is strongly inclined to the opinion, that, without proving an actual or legal presence by two witnesses, the overt act laid in this indictment cannot be proved.

But this opinion is controverted on two grounds.

The first is, that the indictment does not charge the prisoner to have been present.

The second, that although he was absent, yet, if he caused the assemblage, he may be indicted as being present, and convicted on evidence that he caused the treasonable act.

The first position is to be decided by the indictment itself. The court understands the allegation differently from the attorney for the United States. The court understands it to be directly charged, that the prisoner did assemble with the multitude, and did march with them. Nothing will more clearly test this construction than putting the case into a shape which it may possibly take. Suppose the law to be that the indictment would be defective unless it alleged the presence of the

person indicted at the act of treason. If upon a special verdict facts should be found which amounted to a levying of war by the accused, and his counsel should insist that he could not be condemned because the indictment was defective in not charging that he was himself one of the assemblage which constituted the treason, or because it alleged the procurement defectively, would the attorney admit this construction of his indictment to be correct? I am persuaded that he would not, and that he ought not to make such a concession. If, after a verdict, the indictment ought to be construed to allege that the prisoner was one of the assemblage at Blennerhassett's island, it ought to be so construed now. But this is unimportant, for if the indictment alleges that the prisoner procured the assemblage, that procurement becomes part of the overt act, and must be proved as will be shown hereafter.

The second position is founded on 1 Hale, 214. 288. and 1 East, 127.

While I declare that this doctrine contradicts every idea I had ever entertained on the subject of indictments, since it admits that one case may be stated, and a very different case may be proved, I will acknowledge that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts, and, therefore, ought not to be charged as the same act. The great objection to this mode of proceeding is, that the proof essentially varies from the charge in the character and essence of the offence, and in the testimony by which the accused is to defend himself. These dicta of Lord Hale, therefore, taken in the extent in which they are understood by the counsel for the United States, seem to be repugnant to the declarations we find everywhere, that an overt act must be laid, and must be proved. No case is cited by Hale in support of them, and I am strongly inclined to the opinion that, had the public received his corrected, instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied to all cases of treason, they are repugnant to the principles for which Hale contends, for which all the elementary writers contend, and from which courts have in no case, either directly reported, or referred to in the books, ever departed. These principles are, that the indictment must give notice of the offence; that the accused is only bound to answer the particular charge which the indictment contains, and that the overt act laid is that particular charge. Under such circumstances, it is only doing justice to Hale to examine his dicta, and if they will admit of being understood in a limited sense, not repugnant to his own doctrines, nor to the general principles of law, to understand them in that sense.

"If many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within the statute, for in such case, in treason, all are principals."

This is laid down as applicable singly to the treason of counterfeiting the coin, and is not applied by Hale to other treasons. Had he de-

signed to apply the principle universally, he would have stated it as a general proposition; he would have laid it down in treating on other branches of the statute, as well as in the chapter respecting the coin; he would have laid it down when treating on indictments generally. But he has done neither. Every sentiment bearing in any manner on this point, which is to be found in Lord Hale, while on the doctrine of levying war, or on the general doctrine of indictments, militates against the opinion that he considered the proposition as more extensive than he has declared it to be. No court could be justified in extending the dictum of a judge beyond its terms, to cases in which he has expressly treated, to which he has not himself applied it, and on which he as well as others has delivered opinions which that dictum would overrule. This would be the less justifiable if there should be a clear legal distinction indicated by the very terms in which the judge has expressed himself between the particular case to which alone he has applied the dictum, and other cases to which the court is required to extend it.

There is this clear legal distinction. "They may," says Judge Hale, "be indicted for counterfeiting generally." But if many conspire to levy war, and some actually levy it, they may not be indicted for levying war generally. The books concur in declaring that they cannot be so indicted.[1] A special overt act of levying war must be laid. This distinction between counterfeiting the coins, and that class of treasons among which levying war is placed, is taken in the statute of Edw. III. That statute requires an overt act of levying war to be laid in the indictment, and does not require an overt act of counterfeiting the coin to be laid. If in a particular case where a general indictment is sufficient, it be stated that the crime may be charged generally according to the legal effect of the act, it does not follow, that in other cases where a general indictment would be insufficient, where an overt act must be laid, that this overt act need not be laid according to the real fact. Hale, then, is to be reconciled with himself, and with the general principles of law, only by permitting the limits which he has himself given to his own dictum, to remain where he has placed them.

In p. 238. Hale is speaking generally of the receiver of a traitor, and is stating in what such receiver partakes of an accessary. 1st. His indictment must be special of the receipt, and not generally that he did the thing, which may be otherwise in case of one that is procurer, counseller or consenter."

The words "*may* be otherwise," do not clearly convey the idea that it is universally otherwise. In all cases of a receiver the indictment *must* be special on the receipt, and not general. The words it "*may* be otherwise in case of a procurer," &c. signify that it may be otherwise in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons without contradicting the doctrines of Hale himself, as well as of other writers, but cannot be otherwise in all treasons without such contradiction, the fair construction is, that Hale used these words in their restricted sense; that he used them in reference to treasons, in which a general indictment would lie, not to

treasons where a general indictment would not lie, but an overt act of the treason must be charged. The two passages of Hale thus construed, may, perhaps, be law, and may leave him consistent with himself. It appears to the court to be the fair way of construing them.

These observations relative to the passages quoted from Hale, apply to that quoted from East, who obviously copies from Hale, and relies upon his authority.

Upon this point Keeling, 26. and 1 Hale, 626. have also been relied upon. It is stated in both, that if a man be indicted as a principal and acquitted, he cannot afterwards be indicted as accessary before the fact. Whence it is inferred, not without reason, that evidence of accessorial guilt may be received on such an indictment. Yet no case is found in which the question has been made and decided. The objection has never been taken at a trial and overruled, nor do the books say it would be overruled. Were such a case produced, its application would be questionable. Keeling says, an accessary before the fact is *quodam modo*, in some manner guilty of the fact. The law may not require that the manner should be stated, for in felony it does not require that an overt act should be laid. The indictment, therefore, may be general. But an overt act of levying war must be laid. These cases, then, prove in their utmost extent, no more than the cases previously cited from Hale and East. This distinction between indictments which may state the fact generally, and those which must lay it specially, bear some analogy to a general and a special action on the case. In a general action, the declaration may lay the assumpsit according to the legal effect of the transaction, but in a special action on the case, the declaration must state the material circumstances truly, and they must be proved as stated. This distinction also derives some aid from a passage in Hale, 625. immediately preceding that which has been cited at the bar. He says, "If A. be indicted as principal, and B. as accessary *before* or *after*, and both be acquitted, yet B. may be indicted as principal, and the former acquittal as accessary is no bar.

The crimes, then, are not the same, and may not indifferently be tried under the same indictment. But why is it that an acquittal as principal may be pleaded in bar to an indictment as accessary, while an acquittal as accessary may not be pleaded in bar to an indictment as principal? If it be answered that the accessorial crime may be given in evidence on an indictment as principal, but that the principal crime may not be given in evidence on an indictment as accessary, the question recurs, on what legal ground does this distinction stand? I can imagine only this. An accessary being *quodam modo* a principal, in indictments where the law does not require the manner to be stated, which need not be special, evidence of accessorial guilt, if the punishment be the same, may possibly be received; but every indictment as an accessary must be special. The very allegation that he is an accessary must be a special allegation, and must show how he became an accessary. The charges of this special indictment, therefore, must be proved as laid, and no evidence which proves the crime in a form sub-

stantially different can be received. If this be the legal reason for the distinction, it supports the exposition of these dicta which has been given. If it be not the legal reason, I can conceive no other.

But suppose the law to be as is contended by the counsel for the United States. Suppose an indictment, charging an individual with personally assembling among others, and thus levying war, may be satisfied with the proof that he caused the assemblage. What effect will this law have upon this case?

The guilt of the accused, if there be any guilt, does not consist in the assemblage, for he was not a member of it. The simple fact of assemblage no more affects one absent man than another. His guilt, then, consists in procuring the assemblage, and upon this fact depends his criminality. The proof relative to the character of an assemblage must be the same whether a man be present or absent. In the general, to charge any individual with the guilt of an assemblage, the fact of his presence must be proved. It constitutes an essential part of the overt act. If, then, the procurement be substituted in the place of presence, does it not also constitute an essential part of the overt act? Must it not also be proved? Must it not be proved in the same manner that presence must be proved? If in one case the presence of the individual makes the guilt of the assemblage his guilt, and in the other case the procurement by the individual makes the guilt of the assemblage his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses.

Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact, without which the accused does not participate in the guilt of the assemblage, if it was guilty, a collateral point? This cannot be. The presence of the party, where presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement take the place of presence, and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law. The mind is not to be led to the conclusion that the individual was present, by a train of conjectures or inferences, or of reasoning; the fact must be proved by two witnesses. Neither where procurement supplies the want of presence, is the mind to be conducted to the conclusion that the accused procured the assembly, by a train of conjectures or inferences, or of reasoning; the fact itself must be proved by two witnesses, and must have been committed within the district.

If it be said that the advising or procurement of treason is a secret transaction which can scarcely ever be proved in the manner required by this opinion; the answer which will readily suggest itself is, that the difficulty of proving a fact will not justify conviction without proof. Certainly it will not justify conviction without a direct and positive witness in a case where the constitution requires two. The more correct

inference from this circumstance would seem to be, that the advising of the fact is not within the constitutional definition of the crime. To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself.

If, then, the doctrines of Keeling, Hale and East are to be understood in the sense in which they are pressed by the counsel for the prosecution, and are applicable in the United States, the fact that the accused procured the assemblage on Blennerhassett's island must be proved, not circumstantially, but positively by two witnesses, to charge him with that assemblage. But there are still other most important considerations, which must be well weighed before this doctrine can be applied to the United States.

The eighth amendment to the constitution has been pressed with great force, and it is impossible not to feel its application to this point. The accused cannot be truly said to be "informed of the nature and cause of the accusation," unless the indictment shall give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defence.

It is also well worthy of consideration, that this doctrine, so far as it respects treason, is entirely supported by the operation of the common law, which is said to convert the accessary before the fact into the principal, and to make the act of the principal his act. The accessary before the fact is not said to have levied war. He is not said to be guilty under the statute. But the common law attaches to him the guilt of that fact which he has advised or procured, and, as contended, makes it his act. This is the operation of the common law, not the operation of the statute. It is an operation, then, which can only be performed where the common law exists to perform it. It is the creature of the common law, and the creature presupposes its creator. To decide, then, that this doctrine is applicable to the United States, would seem to imply the decision that the United States, as a nation, have a common law which creates and defines the punishment of crimes accessorial in their nature. It would imply the further decisions that these accessorial crimes are not, in the case of treason, excluded by the definition of treason, given in the constitution. I will not pretend that I have not individually an opinion on these points, but it is one which I should give only in a case absolutely requiring it, unless I could confer respecting it with the judges of the supreme court.

I have said that this doctrine cannot apply to the United States, without implying those decisions respecting the common law which I have stated, because, should it be true, as is contended, that the constitutional definition of treason comprehends him who advises or procures an assemblage that levies war, it would not follow that such adviser or procurer might be charged as having been present at the assemblage. If the adviser or procurer is within the definition of levying war, and, independent of the agency of the common law, does actually levy war, then the advisement or procurement is an overt act of levying war.

If it be the overt act on which he is to be convicted, then it must be charged in the indictment, for he can only be convicted on proof of the overt acts which are charged.

To render this distinction more intelligible, let it be recollected, that although it should be conceded that since the statute of William and Mary, he who advises or procures a treason may, in England, be charged as having committed that treason, by virtue of the common law operation, which is said, so far as respects the indictment, to unite the accessorial to the principal offence, and permit them to be charged as one, yet it can never be conceded that he who commits one overt act under the statute of Edward, can be charged and convicted on proof of another overt act. If, then, procurement be an overt act of treason under the constitution, no man can be convicted for the procurement under an indictment charging him with actually assembling, whatever may be the doctrine of the common law in the case of an accessorial offender.

It may not be improper, in this place, again to advert to the opinion of the supreme court, and to show that it contains nothing contrary to the doctrine now laid down. That opinion is, that an individual may be guilty of treason "who has not appeared in arms against his country; that if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually in the general conspiracy, are to be considered as traitors."

This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising certainly, and, perhaps, the procuring, is more in the nature of a conspiracy to levy war, than of the actual levying of war. According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. This part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act on which alone the person who performs it can be convicted.

The opinion does not declare that the person who has performed this remote and minute part may be indicted for a part which was in truth performed by others, and convicted on their overt acts. It amounts to this and nothing more, that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of war, do, in the sense of the constitution, levy war. It may possibly be the opinion of the supreme court, that those who procure a treason, and do nothing further, are guilty under the constitution; I only say that opinion has not yet been given; still less has it

been indicated, that he who advises shall be indicted as having performed the fact.

It is, then, the opinion of the court, that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's island, or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court, that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place. Indeed, the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion, that if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and, therefore, is not admissible in this country unless by virtue of a similar operation; a point far from being established, but on which, for the present, no opinion is given. If, however, this point be established, still the procurement must be proved in the same manner, and by the same kind of testimony, which would be required to prove actual presence.

The second point in this division of the subject is, the necessity of adducing the record of the previous conviction of some one person who committed the fact alleged to be treasonable.

This point presupposes the treason of the accused, if any has been committed, to be accessorial in its nature. Its being of this description, according to the British authorities, depends on the presence or absence of the accused at the time the fact was committed. The doctrine on this subject is well understood, has been most copiously explained, and need not be repeated. That there is no evidence of his actual or legal presence is a point already discussed and decided. It is, then, apparent that, but for the exception to the general principle which is made in cases of treason, those who assembled at Blennerhassett's island, if that assemblage was such as to constitute the crime, would be principals, and those who might really have caused that assemblage, although, in truth, the chief traitors, would, in law, be accessaries.

It is a settled principle in the law that the accessary cannot be guilty of a greater offence than his principal. The maxim is *accessorius sequitur naturam sui principalis*; the accessary follows the nature of his principal. Hence results the necessity of establishing the guilt of the principal before the accessary can be tried. For the degree of guilt which is incurred by counselling or commanding the commission of a crime depends upon the actual commission of that crime. No man is an accessary to murder unless the fact has been committed.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A. shall be established in a prosecu-

tion against B. Consequently, if the guilt of B. depends on the guilt A., A. must be convicted before B. can be tried. It would exhibit a monstrous deformity, indeed, in our system, if B. might be executed for being accessory to a murder committed by A. and A. should afterwards, upon a full trial, be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessary was originally the same, and although in many instances it is still the same, the accessary could, in no case, be tried before the conviction of his principal, nor can he yet be tried previous to such conviction, unless he requires it, or unless a special provision to that effect be made by statute.

If, then, this was a felony, the prisoner at the bar could not be tried until the crime was established by the conviction of the person by whom it was actually perpetrated.

Is the law otherwise in this case, because, in treason all are principals?

Let this question be answered by reason and by authority.

Why is it that in felonies, however atrocious, the trial of the accessary can never precede the conviction of the principal? Not because the one is denominated the principal and the other the accessary, for that would be ground on which a great law principle could never stand. Not because there was, in fact, a difference in the degree of moral guilt, for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe, is, perhaps, of the two the blacker criminal; and, were it otherwise, this would furnish no argument for precedence in trial.

What, then, is the reason?

It has been already given. The legal guilt of the accessary depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself.

Does not this reason apply in full force to a case of treason?

The legal guilt of the person who planned the assemblage on Blennerhassett's island depends, not simply on the criminality of the previous conspiracy, but on the criminalty of that assemblage. If those who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. His guilt, then, in contemplation of law, depends on theirs, and their guilt can only be established in a prosecution against themselves. Whether the adviser of this assemblage, be punishable with death as a principal or as an accessary, his liability to punishment depends on the degree of guilt attached to an act which has been perpetrated by others, and which, if it be a criminal act, renders them guilty also. His guilt, therefore, depends on theirs, and their guilt cannot be legally established in a prosecution against him.

The whole reason of the law, then, relative to the principal and accessary, so far as respects the order of trial, seems to apply in full force to a case of treason committed by one body of men in conspiracy with others who are absent.

If from reason we pass to authority, we find it laid down by Hale,

Foster, and East, in the most explicit terms, that the conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. This position is also maintained by Leach, in his notes on Hawkins, and is not, so far as the court has discovered, any where contradicted.

These authorities have been read and commented on at such length, that it cannot be necessary for the court to bring them again into view. It is the less necessary, because it is not understood that the law is controverted by the counsel for the United States.

It is, however, contended, that the prisoner has waived his right to demand the conviction of some one person who was present at the fact, by pleading to his indictment.

Had this indictment even charged the prisoner according to the truth of the case, the court would feel some difficulty in deciding that he had, by implication, waived his right to demand a species of testimony essential to his conviction. The court is not prepared to say that the act which is to operate against his rights did not require that it should be performed with a full knowledge of its operations. It would seem consonant to the usual course of proceeding in other respects, in criminal cases, that the prisoner should be informed that he had a right to refuse to be tried until some person who committed the act should be convicted, and that he ought not to be considered as waiving the right to demand the record of conviction, unless with the full knowledge of that right he consented to be tried. The court, however, does not decide what the law would be in such a case. It is unnecessary to decide it, because pleading to an indictment in which a man is charged as having committed an act, cannot be construed to waive a right which he would have possessed, had he been charged with having advised the act. No person indicted as a principal can be expected to say, I am not a principal, I am an accessary; I did not commit, I only advised the act.

The authority of the English cases on this subject depends in a great measure on the adoption of the common law doctrine of accessorial treasons. If that doctrine be excluded, this branch of it may not be directly applicable to treasons committed within the United States. If the crime of advising or procuring a levying of war be within the constitutional definition of treason, then he who advises or procures it must be indicted on the very fact, and the question whether the treasonableness of the act may be decided, in the first instance, in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of principal and accessary, rather than on the positive authority of those decisions.

This question is not essential in the present case, because, if the crime be within the constitutional definition, it is an overt act of levying war, and to produce a conviction ought to have been charged in the indictment.

The law of the case being thus far settled, what ought to be the decision of the court on the present motion? Ought the court to set and hear testimony which cannot affect the prisoner, or ought the court to arrest that testimony? On this question much has been said; much that may, perhaps, be ascribed to a misconception of the point really under consideration. The motion has been treated as a motion confessedly made to stop relevant testimony, and in the course of the argument, it has been repeatedly stated by those who oppose the motion, that irrelevant testimony may, and ought to be, stopped. That this statement is perfectly correct, is one of those fundamental principles in judicial proceedings which is acknowledged by all, and is founded in the absolute necessity of the thing. No person will contend that in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute this tribunal, for they do not agree. The jury cannot constitute it, for the question is, whether they shall hear the testimony or not. Who, then, but the court can constitute it? It is, of necessity, the peculiar province of the court to judge of the admissibility of testimony. If the court admit improper or reject proper testimony, it is an error of judgment, but it is an error committed in the direct exercise of their judicial functions.

The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment, unless the common law principle respecting accessaries should render it unnecessary; and there is not only no witness who has proved his actual or legal presence; but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions, at a different place, and in a different state, in order to prove what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blennerhassett's island? No, that is not alleged. It is well known that such testimony is not competent to establish such a fact. The constitution and law require that the fact should be established by two witnesses, not by the establishment of other facts from which the jury might reason to this fact. The testimony, then, is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses, in such manner that the question of fact ought to be left with the jury. The conclusion that in this state of things no testimony can be admissible, is so inevitable, that the counsel for the United States could not resist it. I do not understand them to deny, that if the overt act be not proved by two witnesses so as to be submitted to the jury, that all other testimony must be

irrelevant, because no other testimony can prove the act. Now an assemblage on Blennerhassett's island is proved by the requisite number of witnesses, and the court might submit it to the jury, whether that assemblage amounted to a levying of war, but the presence of the accused at that assemblage being no where alleged except in the indictment, the overt act is not proved by a single witness, and of consequence, all other testimony must be irrelevant.

The only difference between this motion as made, and the motion in the form which the counsel for the United States would admit to be regular, is this. It is now general for the rejection of all testimony. It might be particular with respect to each witness as adduced. But can this be wished, or can it be deemed necessary? If enough is proved to show that the indictment cannot be supported, and that no testimony, unless it be of that description which the attorney for the United States declares himself not to possess, can be relevant, why should a question be taken on each witness?

The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion.

If a contradiction between the two opinions does exist, the court cannot perceive it. It was said that levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge. To that declaration the court still adheres.

It was said that if the overt act was not proved by two witnesses, no testimony in its nature corroborative or confirmatory, was admissible, or could be relevant.

From that declaration there is certainly no departure. It has been asked, in allusion to the present case, if a general, commanding an army, should detach troops for a distant service, would the men composing that detachment be traitors, and would the commander in chief escape punishment.

Let the opinion which has been given answer this question. Appearing at the head of an army would, according to this opinion, be an overt act of levying war; detaching a military corps from it for military purposes might also be an overt act of levying war. It is not pretended that he would not be punishable for these acts, it is only said that he may be tried and convicted on his own acts, in the state where those acts were committed, not on the acts of others in the state where those others acted.

Much has been said in the course of the argument on points, on which the court feels no inclination to comment particularly, but which may, perhaps, not improperly, receive some notice.

That this court dares not usurp power is most true.

That this court dares not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty, or

the opprobium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace.

That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should on each side press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is, perhaps, a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that they would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

The arguments on both sides have been intently and deliberately considered. Those which could not be noticed, since to notice every argument and authority would swell this opinion to a volume, have not been disregarded. The result of the whole is a conviction as complete as the mind of the court is capable of receiving on a complex subject, that the motion must prevail.

No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's island, can be admitted, because such testimony, being in its nature merely corroborative, and incompetent to prove the overt act in itself, is irrelevant, until there be proof of the overt act by two witnesses.

This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's island was procured by the prisoner. On that point the court, for the present, withholds its opinion for reasons which have been already assigned; and as it is understood from the statements made on the part of the prosecution, that no such testimony exists, if there be such, let it be offered and the court will decide upon it.

The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty, as their own consciences may direct.

APPENDIX.

Note. (C.)

Opinion of Judge Johnson, in the Circuit Court.

The following contains the statement of the case, and the judge's reasons for the decrees given by him in the cases of Rose and Himely, and Rose and Groenings.

ALTHOUGH there are three distinct libels filed in these cases, yet, in the course of investigation, they are brought all to depend upon the same circumstances, and were argued before me as one cause.

The two first were decided in September last, when the copy of the condemnation had not been received, and the decision of the district court rested upon the ground of a defect of condemnation. But upon a motion before this court for leave to adduce new evidence upon the appeal, I decided in favour of its admissibility, and the condemnation having been received before the expiration of the term probatory assigned the appellants, consistently with my decision, I am to consider the condemnation as equally affecting the rights of the parties on all the three cases: at the hearing upon the appeal there was also a witness produced and sworn in behalf of the appellants, who testified that he was one of the officers of the capturing vessel, and that he saw in possession of the captain a permit from the agent of the French government, resident at St. Jago de Cuba, to sell the Sarah and her cargo, and that she was advertised and sold by virtue of that permit; but I shall take no notice of this evidence in forming my opinion, because it appears to me subject to this objection, that a certificate of the granting of such a permit might have been obtained from the chancery of the agent himself, if there existed such an officer, and he had done that act in an official capacity. Upon the hearing of the two first causes in the district court, the identity of the goods was also made a point, and a defect of evidence to prove their identity was strongly insisted upon in the argument, but this ground was relinquished upon the appeal, and the only point contested was the right of property.

The following are the circumstances on which the court proceeds to

form its decision, as they are collected from the libels, answers, depositions and writings in evidence:

The schooner Sarah, an American bottom, owned by citizens of the United States, sailed from Norfolk with a cargo consisting entirely of provisions, owned likewise by citizens of the United States. Whatever port she may have cleared for, her real destination was to the brigand ports in the island of St. Domingo, several of which she entered, and having disposed of her outward cargo, took in return the sugar and coffee which is the subject of the suit. On her voyage from Port au Paix, one of the brigand ports, she was captured by a French privateer and carried into Barracoa, where Henry Rose, the supercargo, and now the libellant in these cases, purchased her of the captors. The principal part of the cargo was purchased by Captain Cott, of the Example, lying then at Barracoa, in behalf of the respondent, J. J. Himely, and was transferred during the night from the Sarah to the Example. The Example having sailed for this port, she was followed by Captain Rose, and the sugar and coffee, shipped on board her from the Sarah, has been libelled on behalf of the original owners. Prior to the suing out the libel, a part of the coffee had been sold to Messrs. L. and R. Groening, of this place, merchants, who are acknowledged to be innocent purchasers without notice; but as the English doctrine relative to sales in market overt is unknown to the laws of this state, it is not contended that their claim rests on any better ground than that of Himely or Cott, the immediate purchasers from the captors. It appears that when the cargo of The Sarah was sold, no condemnation had taken place; that she was afterwards libelled and condemned at St. Domingo, the 13th July, 1804; whereas the vessel was captured on the 23d February, the sale of the cargo took place on the 18th March, and it had arrived in this port, and a warrant actually issued and served upon it, the 4th May preceding. Upon examining the condemnation, it appears to be professedly founded upon an arrête of the Captain-General Ferrand, dated 1st March, 1804, declaring the port of Santo Domingo to be the only free port in that island, and directing the vessels of neutrals trading to any other port to be brought to adjudication.

It was, indeed, asserted in the argument, and I believe was the fact, that General Le Clerc had formerly issued a similar arrête, but there was not then, nor is there now adduced, any evidence to prove it to the satisfaction of the court, nor does it appear to be one of those facts of general notoriety, which this court is sanctioned in noticing as such.

On behalf of the claimants it is contended, that there is an original defect in the title of the libellants, as the property appears to have been purchased from revolted slaves, a description of people who could not possess, and, of course, could not convey, a right of property to another. That there is a turpitude in this trade, which ought to predispose this court to discountenance the pretensions of the libellants. That if the libellants ever possessed a right, it was defeated by the capture, which alone gave them a possession not to be violated by us; if not

by the capture, by the carrying *infra præsidia*, if not by carrying *infra præsidia*, by the effect of the condemnation.

For the libellants it was argued,

That there could be no original defect in the title acquired from the brigands, because a power existing *de facto* is, as to neutrals, a power *de jure*.

That the subjects of the existing government of Hayti were a mixt multitude of slaves and coloured freemen, the latter of whom, before the revolution, possessed extensive estates, and who, for aught we know, may have been the vendors of these articles.

That the law of nations knows no such description of people as slaves, and it is not, in fact, every description of slaves who are destitute of rights of property; even within the bounds of the United States, widely different are the opinions entertained, and laws existing, on this subject, and the decisions of the court would fluctuate according to the state in which the decisions took place, and the judge who presided.

That if there is turpitude in the trade to the brigand ports, there is an equal degree in the conduct of the claimants, in lying in wait to draw a profit from the ravages on our commerce, and in the clandestine manner in which the cargo was transferred from the one vessel to the other.

That the property of the libellants would not be devested by the capture or carrying *infra præsidia*, because a sentence of condemnation is indispensably necessary to change the property.

That this sentence of condemnation could not operate to produce that effect, because,

1st. Before the condemnation, the captors had parted with that possession which alone could give the court its prize jurisdiction over the property.

2d. Because, before the condemnation, it had actually returned within the jurisdiction of our own courts, and thus became revested by the *jus postliminii*.

3d. Because the sentence of condemnation appears on the face of it to be inconsistent with every idea of law and justice, inasmuch as the fact was committed before the arrête was passed which was made the foundation of the sentence.

4th. Because it is in direct violation of the 12th article of the convention with France, inasmuch as the trade to Port au Prince was a trade to a port of an enemy of France, which is sanctioned, under certain restrictions, by that article; also of the 22d article, which enjoins that the adjudication of American vessels captured shall be made by the tribunals of the country into which the prize shall be carried; also, inasmuch as the 22d article has also been violated, which prohibits the sale of goods captured previous to adjudication by a competent authority.

Without considering these arguments in detail, I shall recur to principles adopted by the district court in its decisions, and afterwards cur-

sorily examine such of the arguments of counsel as shall not appear to me to be disposed of by my previous observations.

In the decree of September, 1804, there are three questions considered.

1st. Whether the libellants could acquire any legal interest by a purchase from the brigands?

2d. Whether the capture and firm possession, without a condemnation, would convey a title to the claimants which this court could not violate?

3d. The question of identity.

The last of these questions has been relinquished upon the appeal. The second no longer exists since the production of the condemnation; and on the first I would only remark, that it is too much of a refinement upon the acquisition of property in commercial transactions, especially in the purchase of the products of the earth from the actual possessors and cultivators of the soil; and it is conclusive against the doctrine on this point insisted on for the claimants, that even the French courts have not ventured to adopt such a principle. But I must here express my dissent from the opinion of my much respected associate in this court, in the decision made by him in the court below on this point, to wit, that he had no jurisdiction of the question; because, that whenever a court has a jurisdiction of the principal subject of a suit, it must, of necessity, decide upon all questions which occur in the course of investigation, and have any bearing upon the principal cause of action. Had the libellants never acquired any legal interest in this property, it is plain that their suit must have been dismissed, without any inquiry into the subsequent occurrences.

In the decree of April, 1805, the only subject considered was the effect of the decree of condemnation, and it was declared irrelevant upon two grounds.

1st. Because, upon the face of it, it appears to have been founded on an ordinance passed subsequent to the commission of the act for which the vessel and cargo were condemned.

2d. Because the property was actually brought within the jurisdiction of the United States before the sentence of condemnation was pronounced.

Upon considering the first of the grounds, it will be immediately perceived that it supposes two things, viz.

That a decree of a foreign court is examinable, and that it derives its validity only from its correctness—doctrines which, in my opinion, can in no wise be maintained. The respect required to be shown to the decrees of foreign tribunals is not founded upon the mere comity of nations; it has, for its foundation, that universal equality and independence of all governments, from which it results, as Vattel observes, "That to undertake to examine the justice of a definitive sentence, is an attack on the jurisdiction of him who passed it." It becomes, therefore, an absolute right of nations, as universal as the principle on which it depends, and one which we cannot dispense with conceding, "That

decisions made by the judge of the place, within the extent of his powers, shall be considered as justly made." Not being at liberty, as it were, to lift the mantle of justice cast upon their decrees, it is, as to other tribunals of justice, immaterial what errors it covers; neither the fallibility of the judge, the perjury of witnesses, nor the oppression and injustice of nations, will sanction a deviation from this general rule. And, perhaps, if this doctrine were not deducible from any fixed principle, nations must long since have adopted it from a necessary attention to general convenience; for, otherwise, the sentence which I am now considering might, perhaps, again be reviewed in the courts of Santo Domingo, and from thence return to our own jurisdiction, after making the circuit of all the courts of Europe.

A question will no doubt here suggest itself to those who hear me; are our citizens, then, bound to acquiesce under every species of injustice? and do they sue in vain to our courts for relief? The answer is, while our government makes one of the society of nations, we are bound to submit to the obligation of those rules which that society has assumed for their government; rules which are founded in truth and wisdom, and, but for the misapplication of fraud and flagitiousness of power, are well calculated to produce the best effects.

It is not in our courts that redress is to be sought for the errors or injustice of foreign adjudications. Nations pledge to each other the lives, the fortunes of their citizens, and even their very national existence, for the integrity and correctness of their judicial tribunals, and "when justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or an odious distinction adopted, to the prejudice of the subjects of another," and negotiation for satisfaction fails, the appeal lies to the *ultima ratio* of nations.

The government is bound to extend a protecting arm to her citizens, whilst confining themselves strictly within the limits of their duty, and to make compensation to them for such injuries as policy may withhold her from resenting.

The jurisdiction of the court of admiralty is of a peculiar nature. Acting wholly *in rem*, and not affecting the rights of any persons whomsoever, except so far as they exist in the thing which is the subject of the libel, its decrees are laid down to be conclusive against all the world; a doctrine which, as to the right of property in the subject libelled, is strictly and universally correct, "Whenever the court is erected within the jurisdictional limits of the power which constitutes it, when the subject is of admiralty jurisdiction, and the court professes to sit and judge according to the law of nations, and the style of the admiralty." Nor must it be supposed that to produce this effect upon the right of property, the decision of the court must be formed upon a *just idea* of the law of nations, as applies to any particular case; a decision founded upon an erroneous opinion will be as efficient, in that respect, as one which flows from the most unerring judgment. It is the thing decreed that *courts of justice* are to look to, not to the reasons from whence the conclusions are deduced.

Governments will, indeed, examine into the correctness of proceedings against their citizens, and insist on satisfaction, or dissolve the bonds of peace.

It remains for me to consider the second of the principles upon which the court below founded its decree of April last in favour of the *libellants*, to wit, "That as the property of the actors was actually brought into their own jurisdiction long before any judicial decision had taken place elsewhere, and the marshal of this court had the custody of it at least three months prior to any such decision, that alone might have been good cause for ordering restitution."

In the argument upon this head, the counsel contended that it was the possession alone which could bring the subject within the jurisdiction of the court of admiralty which condemned it; that in parting with the possession, by the sale, the court then lost its jurisdiction, and could not affect the right of property by their decree. The court below, without adopting this idea in the extent contended for, appears to assume another, to wit, that coming within our jurisdiction, it could no longer be subject to the court of France, and the property revested by the *jus postliminii*. I am sorry here again to be under the necessity of adopting a different opinion. Mere locality will not, of itself, deprive the prize court of one nation of its jurisdiction, nor give jurisdiction to another. The taking as prize is the foundation of admiralty jurisdiction. A prize, brought into our ports by a belligerent, continues subject to the jurisdiction of the capturing power, although the *corpus* be within the limits of another jurisdiction; and it is now the general practice of European nations to condemn in their own courts captured vessels carried into the ports of an ally or even a neutral. On the other hand, a prize brought into our ports would be in no wise subjected by that circumstance to our jurisdiction, except, perhaps, in the single case of its being necessary to assume a jurisdiction to protect our neutrality or sovereignty; as in the case of capture within our jurisdictional limits, or by vessels fitted out in our ports. Nor does it appear to me that the *jus postliminii* can at all attach in this case, because that this capture was not a reprisal upon us as a nation, but upon a single offending individual in the commission of an act unauthorized by his nation. To satisfy the mind on this subject, it is necessary to inquire what is the liability of an individual of a neutral state, who commits an act inconsistent with his neutrality, or even with the municipal laws of another nation? How is his state affected by his conduct, and who is to decide upon the offence with which he is charged? As to the tribunal that must determine on the offence, there is no longer a contrariety of opinion entertained among civilized nations. Every nation is the arbiter and vindicator of its own rights, and the courts of the capturing power have exclusive jurisdiction of questions arising on supposed breaches of neutrality, the violation of belligerent rights, or even of municipal law. With regard to the liability of individuals charged with these offences, it is proper to ob-

serve, that in strictness every nation is bound to restrain its own citizens from the commission of offences against all other nations. But as it is impossible, in the present state of things, for the most vigilant government to prevent these aggressions, which a desire of gain and the spirit of adventure are hourly producing, nations have agreed in giving up the individual to the consequence of his own temerity, and the offender is now treated as an individual enemy, abandoned by his own government, and who cannot ever claim the rights of war, but from the humanity or policy of his captor. A consideration which will set this idea in a strong point of view, and show that he is considered as waging an individual war with the capturing belligerent, is, that if he escapes or rescues his vessel after capture, he is never demanded of his government, nor complaint made against him, whatever acts of violence he may commit in so doing, but avoids the danger as another enemy would under similar circumstances.

If an American vessel charged with a breach of neutrality, were to be captured by a belligerent beyond our jurisdictional limits, and before condemnation were to be driven into one of our ports, either by stress of weather, or the pursuit of any enemy, will it be contended that this court could interfere to devest the captor of his possession? It must be recollected that such an attempt would draw to this court the jurisdiction of a question which it is the acknowledged right of the belligerent to have decided by his own tribunals. Therefore, in the case of a neutral captured on a charge of a breach of neutrality, the *jus postliminii* can only attach in case of rescue or recapture, and his nation cannot interfere to restore him that possession which he has lost by the capture, without becoming a party in the contest; she regards the individual and capturing power as belligerents, between whom she is bound equally to observe the laws of neutrality, and particularly to consider possession as the criterion of right, at least while the cause of capture is in its progress to adjudication. It will be perceived how large a portion of the argument went to justify and condemn the trade in which this vessel was engaged; the one side contending that the libellants had committed no act for which she was liable to condemnation; the other, that they had a question which is exclusively cognisable in the courts of the capturing power, but which this court would be compelled to decide upon if the libel be sustained upon a claim interposed on behalf of the captors, or, even, I conceive, of their vendee, unless there were reason to contend that the vessel was piratically captured.

At the same time I heartily concur in the opinion, that as far as between neutrals, at least, a sentence of condemnation is indispensably necessary to produce a complete devesture of property, and unless the neutral property captured be put in a train for legal adjudication, I should think a nation at liberty to seize it as being piratically taken; for the capturing power is bound to satisfy the neutral nation that she had a legal right to attack her citizen; and it will be found, upon reflection, that this cannot be satisfactorily done in any other mode than

by a decree of her tribunals of justice. Much has been said about the different rules adopted by European nations respecting the devesture of property. These rules were universally adopted by the respective nations to regulate the claims of their own citizens in questions of salvage and restitution. In case of alliances in war, each nation extended to its ally the benefit of a rule which ascertained the rights of her own citizens. And the correctness of these rules was mere matter of speculation, in no wise affecting the interest of neutrals, until Great Britain thought proper, in the last war, to exact a salvage on the recapture of neutral property. There appears to me to remain but two of the points made by counsel, on which it may be necessary for me to remark.

1st. How far the sentence of condemnation would affect the property after the sale.

2d. Whether the whole transaction was not inconsistent with the treaty subsisting between the two nations, and, therefore, producing no change of property.

1st. In the case of Sheafe and Turner *v.* A parcel of Sugars, decided in the district court of this district in the year 1800, in favour of the purchasers, and affirmed on appeal to the circuit court, the property captured was carried into the Havanna and libelled and condemned by a French court sitting at the Cape. The sale also took place prior to the condemnation. It was, indeed, asserted in that case, as it was in this, that the sale was made with the consent of the captain, but there was no evidence to prove it. In two important features, these cases are parallel, and I might rest my opinion on this point, on precedent alone; but it affords me more satisfaction to be able also to decide on principle. As the sale was not made by order of a competent tribunal, and was made by the captors at a time when their rights were not consummated by a judicial decision, the claimant in this case could have acquired no more than an inchoate right, subject to be confirmed or defeated by the event of the decision of the court to which the cause was preferred; that is, he acquired no more interest than what was possessed by the captor from whom he purchased. Had the decision been against the captors, with the evidence now before me, I should not hesitate to decide in favour of restitution; but when once the decree of condemnation was passed, the government of France has made the act of capture its own, and all questions of individual interest are at an end.

The whole of the argument founded on the violation of the treaty, is subject to the general objection, that it leads to a revision of a decree of a foreign tribunal.

The French courts are bound by the convention with France, and it is to be presumed, that they bear it in mind in their decisions. They possess the same power in construing its meaning and effect that we do, and though influenced by an erroneous opinion, that would not, of itself, vitiate their decrees. With regard to the ground of the argument drawn from the 12th article, to wit, that Port de Paix is the port

of an enemy of France, and, therefore, a trade with it is sanctioned by that article, I think is totally incorrect in point of fact. France has not yet relinquished the contest, and until she does, I think that all the ports of the island are still ports of France, and that she possesses the right to exclude all the world from a commerce with them, and to fix the penalty for a breach of such exclusion. There is a peculiarity in the unhappy conflict raging in that devoted island, which should make us hesitate in applying to it the general rules of war between independent nations. Great Britain, deeply interested as she is in embarrassing and distressing her enemy, has not ventured to apply the general laws of war to this newly erected empire. On the contrary, she condemns our vessels carrying contraband of war to the brigand ports, as if carrying to the ports of her enemy, although, in fact, it is carrying them to the most inveterate enemy of her rival. As the 20th article relates only to the case of a capture for carrying contraband of war to an enemy's port, I shall pass it over without any observations, and shall close with a few remarks on the 22d article, the last noticed in the argument.

The first clause of this article, and the only one relating to this case, is in the following words: "It is further agreed, that in all cases, the established courts for prize causes in the country to which prizes may be conducted, shall take cognisance of them," &c. It strikes me, upon an attentive consideration of this article, that the only object of it was a recognition of the established doctrine, that the courts of the capturing power shall judge of the legality of capture, and to add the very necessary provision that the reasons of condemnation shall be in all cases expressed in their decrees. But certainly the words literally taken, will produce the inference contended for by counsel, to wit, that vessels captured from our citizens by France, cannot be condemned, except in a French port, for it would be absurd to suppose that it was intended to give jurisdiction to the courts of any neutral or ally, into whose ports such prizes might be carried. If this were a just construction of the article alluded to, it would only follow, that a violation of the treaty had been committed, for which France is bound to make atonement, and that the court of admiralty of Santo Domingo was incorrect in proceeding to adjudicate a vessel not lying in their own port. But I conceive that the validity of the decree will still remain unshaken as to the change of property.

If this article was not brought to the notice of that court, it may well be attributed to the laches of the libellant himself in not making this defence, or, indeed, any other in a court that was open to his claims. But there is a liberality and candour necessary in the construction of treaties which would make me reject the one here contended for, were it necessary to decide upon it. I could never be induced to think that a point of such importance would be left to mere inference, by the able men who negotiated that treaty, when it could have been so easily expressed, in a single unequivocal sentence. Nor do I think the interest of the neutral would be promoted by a construction which would

subject the fair trader to the melancholy inconvenience of being detained in some distant port, until he could be safely conveyed to that of the captor for adjudication, or be exposed, perhaps, to the perils of the ocean during some tedious voyage for the same purpose.

Upon the whole, I am of opinion that the decrees in these cases should be reversed, and the libels be dismissed. But as the claimant purchased before condemnation, and the libellant had a fair claim to this investigation, I am of opinion that each party should pay his own costs.

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BOTTOMRY.

1. The claim of bottomry is to be preferred to all others, except seamen's wages, *for the voyage on which the bottomry is founded;* but it can extend no further. *Blaine* v. *Ship Charles Carter,* 332
2. If the obligee of a bottomry bond suffer the ship to make several voyages, without asserting his lien, and executions are levied upon the ship by other creditors, the obligee loses his lien upon the ship, *ib.* 328
3. *Quære,* whether a bottomry bond executed by the owner at home, creates a lien on the ship which can be enforced in a court of admiralty? *ib.* 332

BRITISH CREDITORS.

1. See *Limitations. Confiscation,* 1, 2.
2. If a confiscating act, independent of the British treaty, would be construed to destroy the claim of a British mortgagee, the treaty reinstates the lien in its full force, and

a subsequent sale could only pass it *cum onere*. *Higginson* v. *Mein*, 415

BRITISH SUBJECTS.

See *Aliens*, 2, 3.

BRITISH TREATY.

See *Limitations*, 1. *Aliens*, 2, 3. *Confiscation*, 1, 2.

CAPTURE.

See *Admiralty*, 1, 2, 3, 4, 5. 10. 12, 13. *Abandonment*, 1.

COLLECTOR.

1. A collector selling land for taxes must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted. It is incumbent on the vendee to prove the authority to sell. *Stead* v. *Course*, 403
2. By the tax laws of Georgia for the years 1790 and 1791, the collector was authorized to sell land only on the deficiency of personal estate; and then to sell only so much as was necessary to pay the taxes in arrear. Under those laws, the sale of a *whole* tract, when a small part would have been sufficient to pay the taxes, was void, *ib.*
3. A collector of the revenue of the United States, after his removal from office, has no authority to collect duties outstanding at the time of his removal; but this power and duty devolves upon his successor. *Sthreshley* v. *United States*, 169

COLUMBIA.

1. The right of Virginia to legislate for that part of the district of Columbia which was ceded by her to the United States continued until the 27th of February, 1801. *Young* v. *Bank of Alexandria*. 384
2. See *Appeal*, 4.

COMMISSION.

1. The certificate of commissioners named in a *dedimus*, that they took, in due form of law, the oath annexed to the commission, is sufficient evidence of that fact. *Grant* v. *Naylor*, 224
2. It is not necessary to give notice to the opposite party of the time and place of executing the commission. *Grant* v. *Naylor*, 224
3. If the return of the commission be enclosed in an envelop which is sealed, no other sealing by the commissioners is necessary, *ib.* 225
4. If, after a commission has issued, the parties have leave to amend, and a new issue be made up, similar in substance to the former issue, the depositions taken under such commission may be used at the trial of the new issue, *ib.* 232

COMMITMENT.

1. A person may be committed for a crime by one magistrate upon an affidavit made before another. *Ex parte Bollman and Swartwout*, 76
2. *Quære*, whether upon a motion to commit a person for treason, an affidavit stating the substance of a letter in possession of the deponent be admissible evidence? *ib.*

COMMON LAW.

1. Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute change their established principles; but courts which are created by written law, cannot transcend that jurisdiction. *Ex parte Bollman and Swartwout*, 93
2. For the meaning of the term *habeas corpus* resort may be had to the common law; but the power to award the writ by any of the courts of the United States must be given by written law, *ib.* 93, 94
3. *Quære*, whether, upon an indictment for treason, proof of procurement can, in this country, by force of the common law, be admitted in evidence to establish a charge of personal presence. *United States* v. *Burr*, *Appendix*, 502

CONFISCATION.

1. The act of Georgia confiscating the estate of the mortgagor is no bar to the claim of the mortgagee, a British merchant, whose debt was only sequestered during the war. The estate of the mortgagor only was confiscated, not that of the mortgagee. *Higginson* v. *Mein*, 415
2. If a confiscating act, independent of the treaty, would be construed to

destroy the claim of a British *mortgagee*, the treaty reinstates the lien in its full force; and a subsequent sale could only pass it with its burden. *Higginson* v. *Mein*, 419

CONNECTICUT.

1. See *Foreign Attachment*, 2. *Covenant*, 2.

CONTINUANCE.

1. The refusal of the court below to continue a cause after it is at issue, cannot be assigned for error. *Woods & Bemis* v. *Young*, 237

CONTRACT.

1. A court of equity will annul a contract which the defendant has failed to perform, and cannot perform on his part. *Skillern* v. *May*, 137
2. A letter of credit, directed by mistake to John and *Joseph*, instead of John and Jeremiah, and delivered to John and Jeremiah, who furnished goods upon the faith of it, does not constitute a contract between the writer of the letter and John and Jeremiah, to whom it was delivered, and parol proof cannot be admitted to make it such. *Grant* v. *Naylor*, 224
3. The promise to pay the debt of another must be in writing, and cannot be explained by parol, *ib.* 235
4. B. in Philadelphia, agreed to pay to A.'s agent in Amsterdam, 170,000 guilders on the first of March, and if he should fail so to do, then to repay to A. the value of the guilders at the rate of exchange current in Philadelphia at the time demand of payment should be made, together with damages at 20 *per cent.* in the same manner as if bills of exchange had been drawn for that sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment which might take place after the demand. B. paid the 170,000 guilders in Amsterdam to the agent of A. on the 13th of *May*, instead of the 1st of March. A. is not entitled to the 20 *per cent.* damages, but may, in a suit upon the bond given to perform the contract, recover interest on the 170,000 guilders from the 1st of March to the 13th of May. *United States* v. *Gurney*, 333

COPARTNERS.

See *Assignee*, 1.

COPPER.

1. Round copper bars, round copper plates, and round copper plates turned up at the edges, are not subject to duty upon exportation. *United States* v. *Kyd & Watson*, 1

COPY.

See *Evidence*, 2.

COSTS.

1. Costs are not given upon a reversal of judgment. *Montalet* v. *Murray*, 47

COURTS OF UNITED STATES.

1. The district courts of the United States are courts of *prize*, and have power to carry into effect the sentences of the old continental courts of appeal in prize causes. *Jennings* v. *Carson*, 2
2. The practice of the district courts of the United States as courts of admiralty is not regulated by law, *ib.* 21
3. When both parties are aliens the courts of the United States have not jurisdiction. *Montalet* v *Murray*, 46
4. If it does not appear upon the record that the suit might have been maintained in the courts of the United States between the original parties to a promissory note, no suit can be maintained upon it in those courts by a subsequent holder, *ib.*
5. The court is bound to give an opinion to the jury on a question of *law*, upon request, if it be pertinent to the issue; but not if it involve a question of fact. *Smith* v. *Carrington*, 71
6. If the complainant be a citizen of France, and the defendant a citizen of the state of Georgia, the circuit court of the United States for the district of Georgia has jurisdiction, although the complainant and defendant are executors, and their testators respectively were citizens of the state of Georgia. *Chappedelaine* v. *Dechenaux*, 308

7. See *Appeal*, 3, 4. *Habeas Corpus*, 1. *Jurisdiction*, 5, 6.
8. If two citizens of the same state, in a suit in a court of their state, claim title under the same act of congress, the supreme court of the United States has appellate jurisdiction from the highest state court to which the question can be carried. *Matthews* v. *Zane*, 382
9. The *district* judge may alone hold a *circuit* court, although there be no judge of the supreme court allotted to that circuit. *Pollard* v. *Dwight*, 421

COVENANT.

1. An action may be supported upon a covenant of *seisin*, although the plaintiff has never been *evicted*, and the declaration need not aver an eviction. *Pollard* v. *Dwight*, 421
2. On the trial of an action in Connecticut for breach of a covenant of seisin of lands in Virginia, the question whether a patent from the state of Virginia for the lands be voidable, is not examinable, *ib.* 422
3. Parol testimony is not admissible in an action on the covenant of seisin, to prove prior claims to the land, *ib.*

CREDIT, LETTER OF.

See *Contract*, 2, 3.

CRIMES.

See *Trial*, 2. *Arrest*, 1.

CUSTODY OF THE LAW.

See *Admiralty*, 3, 4. 7. 12, 13, 14. 25.

DAMAGES.

See *Contract*, 4.

DECLARATION.

See *Covenant*, 1.

DECREE.

See *Admiralty*, 1, 2. 4. 8, 9. 11, 12. 15, 16. 18.

DEED.

1. If a bond be executed by O. as a surety for S. to obtain an appeal from the judgment of a justice of peace in Maryland, and the bond is rejected by the justice, and afterwards, without the knowledge of O. the name of W. be interlined as an obligor who executes the bond, and the justice then accepts it, it is void as to O. *Oneale* v. *Long*, 60.
2. A bond may be delivered by the surety to the principal obligor as an *escrow*. *Pawling* v. *United States*, 219
3. See *Evidence*, 12. *Escrow*, 1, 2.
4. See *Assumpsit*, 1.
5. Parol evidence may be given of the existence of a deed of gift of a slave in Virginia, to show the nature of the possession which accompanied the deed. *Spiers* v. *Willison*, 398

DEMISE.

See *Lease*, 1, 2.

DEMURRER.

1. Upon a demurrer to evidence the testimony is to be taken most strongly against him who demurs; and such conclusions as a jury might justifiably draw, the court ought to draw. *Pawling* v. *United States*, 219

DESCENT.

See *Aliens*, 2, 3.

DETINUE.

Quære, whether 5 years' possession, in Virginia, is alone a good title to enable a plaintiff to recover in detinue? *Ramsay* v. *Lee*, 401

DEVISE.

See *Equity*, 3.

DISTRICT COURT.

See *Courts of United States*, 1, 2. 9.

DUTIES.

1. See *Copper*, 1.
2. An American registered vessel, in part transferred by parol while at sea to an American citizen, and resold to her original owners on her return into port and before her entry, does not, by that operation, lose her privileges as an American bottom, nor become subject to foreign duties. *United States* v. *Willings and Francis*, 48
3. A collector of the revenue of the United States after his removal from office, has no authority to collect the

duties outstanding at the time of his removal, and which accrued while he remained in office; but this power and duty devolve on his successor. *Sthreshley* v. *United States*, 169

4. *Quære*, whether *goods saved* are liable for duties? *Peisch* v. *Ware*, 348
5. See *Forfeiture*, 1.

EJECTMENT.

1. In Vermont, tenants in common may maintain a joint action of ejectment. *Hicks* v. *Rogers*, 165

EQUITY.

1. See *Assignee*.
2. If the obligee of a bond obtain titles in his own name for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the titles to the residue of the lands to be lost by the non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond. *Skillern* v. *May*, 137
3. A court of equity will not interfere between a donee of land by deed and a devisee under the will of the donor, in a case where there is no fraud. *Viers* v. *Montgomery*, 177
4. A court of the United States cannot enjoin proceedings in a *state* court. *Digge* v. *Wolcott*, 179
5. See *Account*, 2, 3.
6. A court of equity will annul a contract which the defendant has failed to perform, and which he cannot perform on his part. *Skillern* v. *May*, 137

ERROR.

1. See *Writ of Error*, 1, 2. *Appeal*, 4.
2. The refusal of the court below to continue a cause, after it is at issue, cannot be assigned for error. *Woods & Bemis* v. *Young*, 237
3. *Quære*, whether a writ of error will lie to the refusal of the court below to quash an execution upon motion? *Mountz* v. *Hodgson*, 324

ESCROW.

1. A bond may be delivered by a surety to the principal obligor, as an *escrow*. *Pawling* v. *United States*, 219
2. If one of the obligors, at the time of executing the bond, say, in the presence of some of the other obligors, "*we acknowledge this instrument, but others are to sign it*;" this is evidence from which the jury may infer a delivery as an *escrow*, by all the obligors who were then present, *ib.*

EVIDENCE.

1. A witness interested in certain admitted items of the plaintiff's account, is still a competent witness to prove other items. *Smith* v. *Carrington*, 62
2. The defendant having read a letter from the plaintiff's agent in answer to a letter from himself, cannot give in evidence a copy of his own letter, without proving it to be a true copy by a witness, *ib.*
3. If improper evidence be admitted by the judge, it is error, and this court cannot inquire into its *importance*, or operation, *ib.* 70
4. *Quære*, whether a foreign sentence of condemnation be conclusive evidence in an action against the underwriters. *Fitzsimmons* v. *Newport Ins. Co.* 185
5. The appraisement made under the order of the district judge by three sworn appraisers, is not conclusive evidence of the value, in a question of jurisdiction, but is better evidence than the opinion of a single witness examined *viva voce* in open court. *United States* v. *Brig Union*, 216
6. After deciding the question of *value* upon the *weight* of the evidence, the court will not continue the cause for the party to produce further evidence as to the *value*, *ib.*
7. Upon a demurrer to evidence the testimony is to be taken most strongly against him who demurs; and such conclusions as a jury might justifiably draw, the court ought to draw. *Pawling* v. *United States*, 219
8. See *Escrow*, 2.
9. A letter of credit, addressed by mistake to John and *Joseph*, instead of John and *Jeremiah*, and delivered to John and *Jeremiah*, is not evidence of a contract between the

writer of that letter and John and Jeremiah. *Grant* v. *Naylor*, 224.
10. See *Commission*, 1, 2, 3, 4.
11. An averment of a demise for 3 years is not supported by proof of a lease for one year certain, and two years further possession on the same terms by the consent of the landlord. *Alexander* v. *Harris*, 299
12. Parol evidence may be given of the existence of a deed of gift to show the nature of the possession which accompanied the deed. *Spiers* v. *Willison*, 398
13. *Quære*, whether 5 years' possession is evidence of a good title for a plaintiff in detinue? *Ramsay* v. *Lee*, 401
14. The evidence of payment which results from lapse of time may be met by circumstances which account for the delay in bringing the suit. *Higginson* v. *Mein*, 420
15. The official certificate of survey returned by a legal sworn surveyor in Virginia, cannot be invalidated by evidence tending to show an impossibility, that the survey could have been made in the intervening time between the date of the entry, and the date of the certificate of survey. *Pollard* v. *Dwight*, 422
16. Parol testimony is not admissible, in an action on the covenant of seisin, to prove prior claims upon the land, *ib.*
17. The sentence of a foreign court of admiralty condemning a vessel for *breach of blockade* is *conclusive* evidence of that fact, in an action on the policy of insurance. *Croudson* v. *Leonard*, 434
18 See *Admiralty*, 21.
19. In treason the overt act must be proved as laid. *Appendix*, *U. States* v. *Burr*, 490
20. *Quære*, whether, on a motion to commit a person for treason, an affidavit stating the substance of a letter in the possession of the deponent, be admissible evidence. *Ex parte Bollman and Swartwout*, 76
21. A person may be committed by one magistrate upon an affidavit made before another, *ib.*
22. In treason, the presence of the party is part of the overt act, and must be proved by two witnesses. *Appendix*, 500
23. An indictment charging a person with being present at an overt act of treason cannot be supported by proving only that the person accused caused the act to be done by others in his absence. No presumptive evidence, no facts from which presence can be inferred, will be sufficient. *Appendix*, 500
24. See *Treason*, 31. 35, 36. 38. 40.
25. If the overt act of treason be not proved by two witnesses so as to be submitted to the jury, all other testimony is irrelevant. *Appendix*, *United States* v. *Burr*, 505, 506
26. *Quære*, whether a foreign sentence be examinable? *Appendix*, *Rose* v. *Himely*, 512

EXCEPTION.

1. A bill of exceptions may be taken to the opinion of the judge in his charge to the jury. *Smith* v. *Carrington*, 63
2. The court is bound to give an opinion to the jury upon a question of law, upon request, if it be pertinent to the issue; but not if it involve a question of fact, *ib.* 71
3. See *Account*, 3. *Error*, 2, 3.

EXECUTION.

See *Error*, 3.

FOREIGN ATTACHMENT.

1. The appearance of the defendant to a foreign attachment in a circuit court of the United States waives all objection to the non-service of process. *Pollard* v *Dwight*, 421
2. Under the foreign attachment law of Connecticut, an absent person who is liable for damages for breach of his covenant, is an absent debtor, *ib.*

FOREIGN COURTS.

See *Admiralty*, 8, 9. 11, 12, 13. 16. *Evidence*, 4. 17.

FOREIGN SENTENCE.

See *Evidence*, 4. 17. *Admiralty*, 8, 9. 11.

FORFEITURE.

1. Wine and spirits saved from a wreck and landed, are not liable to forfeiture, because unaccompanied with

such marks and certificates as are required by law; nor because they were removed without consent of the collector, before the quantity and quality were ascertained, and the duties paid. *Peisch* v. *Ware*, 347

2. The owner of goods cannot forfeit them by an act done without his consent or connivance, or that of some person employed, or trusted by him, *ib.*

FORGERY.

See *Bank of United States*, 1.

FRENCH TREATY.

See *Admiralty*, 11.

GEORGETOWN.

Quære, whether the mayor of Georgetown, in the district of Columbia, be a justice of the peace of the county of Washington? *Mountz* v. *Hodgson*, 324

GEORGIA.

1. The act of limitations of Georgia does not require an entry into lands within seven years after the title accrued, unless there be some adversary possession or title to be defeated by such entry. *Shearman* v. *Irvine's Lessee*, 367
2. See *Collector*, 2.
3. See *Confiscation*, 1.
4. The act of limitations of Georgia does not apply to *mortgagees*. *Higginson* v. *Mein*, 415

GIFT.

1. See *Equity*, 3.
2. By the act of assembly of Virginia, of 1758, no gift of a slave was valid unless in *writing* and *recorded*; but parol evidence may be admitted of the existence of a deed of gift to show the nature of the possession which accompanied the deed. *Spiers* v. *Willison*, 398
3. In Virginia, in 1784, no gift of a slave was valid unless in writing and recorded, although possession accompanied the gift. *Ramsay* v. *Lee*, 401

HABEAS CORPUS.

1. The supreme court of the U. States has power to issue the writ of *habeas corpus ad subjiciendum*. *Ex parte Bollman and Swartwout*, 75
2. See *Common Law*, 2.

INDICTMENT.

1. In treason the indictment must lay an overt act, which must be proved as laid. *Appendix, United States* v. *Burr*, 490
2. See *Evidence*, 23.
3. *Quære*, whether a person who procures an act, can be indicted as having performed that act, 503

INSURANCE.

1. The capture of a *neutral as prize* by a belligerent is a *total loss*, and entitles the insured to abandon. *Rhinelander* v. *Ins. Co. Pennsylvania*, 29
2. The state of the loss *at the time of the offer to abandon*, fixes the rights of the parties, *ib.*
3. *Quære*, whether the sentence of a foreign court of admiralty, condemning the vessel for breach of blockade, be conclusive evidence of that fact in favour of the underwriters. *Fitzsimmons* v. *Newport In. Co.* 185
4. Persisting in an *intention* to enter a blockaded port, after warning, is not *attempting* to enter, *ib.*
5. The right of the insured to abandon and recover for a total loss, depends upon the *state of the fact* at the time of the offer to abandon, and not upon the state of the information received. *Marshall* v. *Delaware In. Co.* 202
6. The technical total loss, arising from capture, ceases with the final *decree* of restitution, although the decree may not have been *executed* at the time of the offer to abandon, *ib.* 203
7. A policy on a *ship* is an assurance of the ship *for* the voyage, not an insurance on the ship *and* the voyage. The underwriters undertake for the *ability* of the ship to perform the voyage, not that she *shall* perform it at all events. *Alexander* v. *Baltimore In. Co.* 370
8. The loss of the voyage as to the cargo, is not a loss of the voyage as to the ship, *ib.* 371
9. If at the time of the offer to abandon, the ship be in possession of the master, in good condition and at full

liberty to proceed on the voyage, the loss of the *cargo* will not authorize the owner of the *vessel* to recover for a total loss of the vessel. *Alexander* v. *Baltimore In. Co.* 371

10. The sentence of a foreign court of admiralty, condemning a vessel for *breach of blockade*, is *conclusive* evidence of that fact in an action on the policy of insurance. *Croudson* v. *Leonard*, 434

INTEREST.

In an action upon a bond conditioned to perform a contract, interest may be recovered in a case not provided for by the contract. *United States* v. *Gurney*, 333

INTERROGATORIES.

See *Admiralty*, 20.

JUDGES.

See *Jurisdiction*, 17. *Exceptions*, 1, 2.

JURISDICTION.

1. The district courts of the United States are courts of *prize*, and have power to carry into effect the sentences of the old continental courts of appeal in prize causes. *Jennings* v. *Carson*, 2

2. See *Admiralty*, 3, 4. 9, 10, 11, 12, 13, 14, 15, 16. 22.

3. When *both* parties are *aliens*, the courts of the United States have not jurisdiction. *Montalet* v. *Murray*, 46

4. If it does not appear upon the record that a suit might have been maintained in the courts of the United States, between the original parties to a promissory note, no suit can be maintained upon it in those courts by a subsequent holder, *ib.*

5. The supreme court of the U. States has power to issue the writ of *habeas corpus ad subjiciendum*. *Ex parte Bollman and Swartwout*, 75

6. The supreme court of the U. States has no jurisdiction but what is given by the constitution or laws of the United States, *ib.* 93

7. Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. *Ex parte Bollman and Swartwout*, 93

8. A court of the *United States* cannot enjoin proceedings in a *state* court. *Diggs* v. *Wolcott*, 179

9. It is incumbent upon the *plaintiff* in error to show that the supreme court of the United States has jurisdiction of the case. *United States* v. *Brig Union*, 216

10. The supreme court will hear *viva voce* testimony to show the value of the matter in dispute, upon a question of jurisdiction, *ib.*

11. The courts of the United States may examine into the jurisdiction of a foreign court whose sentence is offered in evidence; and if that foreign court cannot, consistently with the law of nations, exercise the jurisdiction it has assumed, its sentence is to be disregarded. But the courts of every country are the exclusive judges of their own jurisdiction, so far as it depends upon municipal laws. *Rose* v. *Himely*, 241

12. If the complainant be a French citizen, and the defendant a citizen of the state of Georgia, the circuit court of the United States for the district of Georgia has jurisdiction, although the complainant and defendant are both executors, and their respective testators were both citizens of the state of Georgia. *Chappedelaine* v. *Decheneaux*, 308

13. In deciding the question of jurisdiction the court will look to the *condition* of the bond on which the suit is brought, and not to the penalty. *United States* v. *M'Dowell*, 316

14. An appeal or writ of error lies from the district court of the United States for the territory of Orleans to the supreme court of the United States. *Morgan* v. *Callender*, 370

15. If two citizens of the same state, in a suit in a court of their state, claim title under the same act of congress, the supreme court of the United States has an appellate jurisdiction to revise and correct the judgment of that court in such case. *Matthews* v. *Zane*, 382

16. See *Bank of Alexandria*, 1.

17. The district judge may alone hold a circuit court, although there be no judge of the supreme court allotted to that circuit. *Pollard* v *Dwight*, 421
18. All seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction, and are to be tried *without a jury* *United States* v. *Schooner Betsey and Charlotte*, 443
19. The question whether a seizure for violation of a law of the United States be of admiralty or common law jurisdiction is to be decided by the place of *seizure*, not by the place of the *offence*, *ib.* 452

JURY.

1. See *Exception*, 2.
2. The jurors attending the circuit court of Pennsylvania district are entitled to 1 dollars and 25 cents per diem for their attendance. *Ex parte Lewis and others.* 433
3. See *Jurisdiction*, 18.

JUSTICE OF PEACE.

1. See *Georgetown*, 1. *Deed*, 1.
2. A person may be committed by one magistrate upon an affidavit made before another. *Ex parte Bollman and Swartwout*, 76
3. A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths, *ib.*

KENTUCKY.

Loose and vague expressions in an entry of lands in Kentucky may be rendered sufficiently certain by the reference to natural objects mentioned in the entry, and by comparing the courses and distances of the lines with those natural objects. *Marshall* v. *Currie*, 172

LANDS.

See *Kentucky*, 1. *Aliens*, 2, 3. *Georgia*, 1. 4. *Collector*, 2. *Confiscation*, 1. *Jurisdiction*, 15. *Covenant*, 1, 2, 3. *Evidence*, 15, 16.

LAW.

See *Exception*, 2. *Municipal Law*, 1, 2, 3, 4. *Law of Nations*, 1, 2, 3, 4. *Bank of Alexandria*, 1. *Virginia*, 3.

LAW OF NATIONS.

1. If a foreign court cannot, consistently with the law of nations, exercise the jurisdiction it has assumed, its sentence will be disregarded *Rose* v. *Himely*, 241
2. A seizure of a foreign vessel beyond the territorial jurisdiction, for violation of a municipal regulation, is not warranted by the law of nations, *ib.*
3 *Quære*, whether a French court can, consistently with the law of nations and the treaty, condemn American property never carried into the dominions of France, and while lying in a port of the United States? *ib.* 243
4. No foreign court can question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice. *Hudson* v. *Guestier*, 294
5. Every nation is the arbiter and vindicator of its own rights. *Appendix*, 514

LEASE.

1. An averment of a demise for three years is not supported by proof of a lease for one year certain, and two years' further possession on the same terms, by consent of the landlord. *Alexander* v. *Harris*, 299
2. The plea of *no rent arrear* admits the demise as laid in the avowry, *ib.*
3. The court is bound to give judgment for double rent under the statute of Virginia, *ib.*

LETTER OF CREDIT.

See *Evidence*, 9.

LEVYING WAR.

See *Treason*.

LIBEL.

See *Admiralty*, 5. 7. 22.

LIEN.

See *Bottomry*, 1, 2, 3.

LIMITATIONS.

1. The act of limitations of Virginia is no bar to a British creditor's demand upon a promissory note dated 21st of August, 1772, although one of the plaintiffs was in the country after the treaty of peace, viz. in

1784, and remained here until his death in 1785 *Hopkirk* v. *Bell*, 164
2. The act of limitations of Georgia does not apply to *mortgagees*. *Higginson* v. *Mein*, 415
3. The act of limitations of Georgia does not require an entry into lands within seven years after the title accrued, unless there be some adversary possession or title to be defeated by such entry. *Shearman* v *Irvine's Lessee*, 367

MAGISTRATE.

See *Justice of Peace*, 2, 3.

MISTAKE.

1. A letter of credit, directed by mistake to John and *Joseph*, and delivered to John and Jeremiah, will not support an action by John and *Jeremiah* against the writer of the letter for goods furnished to the bearer upon the faith of such letter of credit. It is not a written contract between the plaintiffs and defendant, and parol proof cannot be admitted to make it such. It is not a case of *ambiguity*, nor of *fraud*, nor of *mistake* on the part of the plaintiffs. *Grant* v. *Naylor*, 224
2. See *Award*, 1.

MORTGAGE.

1. See *Confiscation*. 1, 2. *Limitations*, 2.
2. The possession of the mortgagor is not adverse to the mortgagee. *Higginson* v. *Mein*, 415

MUNICIPAL LAW.

1. The courts of every country are the exclusive judges of their own jurisdiction, so far as it depends upon their municipal laws. *Rose* v. *Himely*, 241
2. The prohibition, by France, of all trade with the revolted blacks of St. Domingo, was the exercise of a municipal, not of a belligereht right, *ib.* 243
3. A seizure of a foreign vessel beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is not warranted by the law of nations; and such seizure cannot give jurisdiction to the courts of the offended country, *ib.*
4. the trial of a municipal seizure must be regulated exclusively by municipal law. *Hudson* v. *Guestier*, 293

NEUTRAL.

See *Insurance*, 1.

NEW-JERSEY.

1. On the 4th of October, 1776, the state of New-Jersey was completely a sovereign and independent state, and had a right to *compel* the *inhabitants* of the state to become *citizens* thereof. *M'Ilvaine* v. *Coxe*, 209
2. See *Aliens*, 2.

NON EST FACTUM.

See *Deed*, 1, 2.

NO RENT ARREAR.

See *Lease*, 1, 2, 3.

NOTICE.

1. The endorsor of a promissory note for the accommodation of the maker, is entitled to *strict notice*. *French* v. *Bank of Columbia*, 141
2. The drawer of a bill of exchange is entitled to *strict notice*, if at the time of drawing *he had a right to expect that his bill would be honoured*, *ib.*
3. It is not necessary to give notice to the opposite party of the time and place of executing a commission. *Grant* v. *Naylor*, 224

OATHS.

See *Justice of Peace*, 3.

ORLEANS.

See *Jurisdiction*, 14.

PAYMENT.

1. If the debtor at the time of payment does not direct to which account the payment shall be applied, the creditor may, at *any time*, apply it to *which account he pleases*. *Mayor and Commonalty of Alexandria* v. *Patten*, 317
2. To an action on a bond conditioned to pay money on a certain day, payment on a subsequent day is not a good plea, without averring it to be the whole sum then due. *United States* v *Gurney*, 333
3. See *Evidence*, 14.

PENNSYLVANIA DISTRICT.

See *Jury*, 2.

PLEADING.

See *Lease*, 2. *Account*, 2. *Covenant*, 1.

POSSESSION.

See *Admiralty*, 14. *Evidence*, 13.

PRACTICE.

1. See *Admiralty*, 6. 20.
2. If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. *Wood* v. *Lide*, 180
3. The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered, *ib.*
4. The supreme court of the United States will hear *viva voce* testimony as to the value of the matter in dispute. *United States* v. *Brig Union*, 216
5. After deciding the question of value upon the weight of evidence produced, the court will not continue the cause for the party to produce further evidence of the *value*, *ib.*
6. The certificate of commissioners named in a *dedimus* that they took, in due form of law, the oath annexed to the commission, is sufficient evidence of that fact. *Grant* v. *Naylor*, 224
7. If the return of the commission be enclosed in an envelop, sealed by the commissioners, no other sealing by the commissioners is necessary, *ib.* 225
8. The refusal of the court below to continue a cause after it is at issue, cannot be assigned for error. *Woods & Bemis* v. *Young*, 237
9. The appearance of a defendant to a foreign attachment in the circuit court of the United States, waives all objection to the non-service of process. *Pollard* v. *Dwight*, 421

PRIZE.

See *Admiralty*, 1, 2.

PROCEEDINGS IN REM.

See *Admiralty*, 3, 4.

PROMISSORY NOTES.

1. If it does not appear upon the record that suit might have been maintained in the courts of the United States between the original parties to a promissory note, no suit can be maintained upon it in those courts by any subsequent holder. *Montalet* v. *Murray*, 46
2. The endorsor of a promissory note for the *accommodation* of the *maker*, is entitled to *strict notice*. *French* v. *Bank of Columbia*, 141

PURCHASER.

1. The purchaser of land from a collector of taxes must show the authority of the collector to sell. *Stead* v. *Course*, 403

REFUGEE.

See *Aliens*, 2.

REGISTER.

1. See *Duties*, 2.
2. If an American registered vessel be sold while at sea to a citizen of the United States, it is not necessary that there should be a bill of sale, or a new register, until the vessel return to some port of the United States. *United States* v. *Willings & Francis*, 48

RENT.

See *Lease*, 1, 2, 3.

REPLEVIN.

See *Lease*, 1, 2. 3.

RESTITUTION.

See *Admiralty*, 1.

REVENUE.

See *Collector*, 3.

REVERSAL.

1. Costs are not given upon *reversal* of judgment. *Montalet* v. *Murray*, 47

SALE.

See *Duties*, 2. *Register*, 2. *Collector*, 1, 2.

SALVAGE.

1. *One half* allowed for salvage in Delaware bay. *Peisch* v. *Ware*, 347
2. Goods saved are not liable to the ordinary revenue laws, *ib.*
3. *Quære*, whether they ought to pay duties, *ib.* 348

SEAMEN'S WAGES.

1. Seamen's wages are a lien prior to bottomry. *Blaine* v. *Ship Charles Carter*, 328

SEISIN.

See *Covenant*, 1, 2, 3.

SEIZURE.

1. Seizures under the prohibition by France of all trade with the revolted blacks of St. Domingo, could lawfully be made only within two leagues of the coast of that island. *Rose* v. *Himely*, 242
2. See *Law of Nations*, 2. *Municipal Law*, 3, 4. *Admiralty*, 15. 19. 23.

SENTENCE.

1. See *Evidence*, 4. 17. *Admiralty*, 8, 9. 11. 16.
2. A sentence of condemnation is necessary to devest the property in cases of capture or seizure. *Appendix*, 514

SLAVE.

See *Gift*, 2, 3.

SOVEREIGNTY.

See *New-Jersey*,

STATE.

See *New-Jersey*.

STATE LAWS.

1. The courts of the United States will respect the construction given to the laws of the several states by the courts of such states. *Higginson* v. *Mein*, 419
Pollard v. *Dwight*, 429

STATUTE OF FRAUDS.

1. The promise to pay the debt of another must be in writing, and cannot be explained by parol. *Grant* v. *Naylor*, 235

ST. DOMINGO.

See *Municipal Law*, 2.

SURVEY.

See *Evidence*, 15.

TAXES.

See *Collector*, 1, 2.

TENANTS IN COMMON.

1. In Vermont, tenants in common may maintain a joint action of ejectment. *Hicks* v. *Rogers*, 165

TERRITORIES OF THE UNITED STATES.

See *Trial*, 2. *Jurisdiction*, 14. *Treason*, 3.

TREASON.

1. To constitute a *levying of war* there must be an *assemblage* of persons for the purpose of effecting *by force* a treasonable purpose. *Enlistment* of men to serve against government is not sufficient. *Ex parte Bollman and Swartwout*, 75
2. When war is levied, all those who perform any part, *however minute*, or *however remote* from the scene of action, *and* who are actually *leagued in the general conspiracy*, are traitors, *ib.*
3. Any assemblage of men for the purpose of revolutionizing *by force* the government established by the United States *in any of its territories*, although as a step to, or the means of, executing some greater projects, amounts to *levying war*, *ib.*
4. The travelling of *individuals* to the place of rendezvous is not sufficient, but the meeting of particular *bodies of men*, and their marching from places of *partial* to a place of general rendezvous, is such an assemblage as constitutes a levying of war, *ib.* 76
5. To *levy* war, is to *raise*, *create*, *make* or *carry on war*. *Appendix*, *United States* v. *Burr*, 470
6. If an army be actually raised for the avowed purpose of carrying on open war against the United States, and subverting their government, a commissary of purchases, who never

saw the army, but who, knowing its object, and leaguing himself with the rebels, supplies that army with provisions, is guilty of an overt act of levying war. *Appendix, United States* v. *Burr*, 470

7. So is a recruiting officer, who, though never in camp, executes the particular duty assigned to him, *ib.*
8. The term "*levying war*," is used in the constitution of the United States in the same sense in which it was understood in England and in this country to have been used in the statute of 25 Edward III. from which it was borrowed, *ib.*
9. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may be said to levy war, *ib.* 472
10. Those who *perform a part* in the prosecution of the war, may be correctly said to levy war, *ib.*
11. But *quære*, whether he who counsels and advises, but performs no act in prosecution of the war; or he who, being engaged in the conspiracy, fails to perform his part, can be said to levy war, *ib.*
12. If the war be actually levied, if the accused has performed a part, but is *not leagued in the conspiracy*, and has *not appeared in arms* against his country, he is not a traitor, *ib.* 474
13. *Constructive treason* is where the direct and avowed object is not the destruction of the sovereign power, *ib.* 475, 476, 477, 478
14. Where a body of men *are assembled* for the purpose of making war against the government, *and are in a condition to make that war*, the assemblage is an act of *levying war*, *ib.* 475
15. The assemblage of men which will constitute *levying war*, must be a "warlike assemblage," carrying the *appearance of force, and in a situation to practise hostility*, *ib.* 480
16. An assemblage of men with a treasonable design, *but not in force*, nor in a condition to attempt the design, nor attended with *warlike appearances*, does not constitute the fact of *levying war*, *ib.* 482
17. To assemble an army of 7,000 men is to place those who are assembled *in a state of force*, *ib.* 484
18. The travelling of several individuals to the place of rendezvous, either separately *or together*, but not in *military form*, would not constitute *levying war*. The act must be unequivocal, and have a *warlike appearance* *Appendix, United States*, v. *Burr*, 485
19. War can only be levied by the employment of *actual force*. Troops must be embodied; men must be *openly* assembled, *ib.* 487
20. *Arms* are not an indispensable requisite to *levying war*; nor the actual *application of force to the object*, *ib.* 488
21. It is not sufficient that an indictment for treason allege ge erally that the accused *had levied war* against the United States. The charge must be more particularly specified by laying an *overt act of levying war*, and this overt act must be proved *as laid*, *ib.* 490
22. A person may be concerned in a treasonable conspiracy, and yet be *legally* as well as actually *absent* while *some one act of the treason* is perpetrated, *ib.*
23. Every one concerned in a treasonable conspiracy is not constructively present at every overt act of the treason committed by others not in his presence, *ib.*
24. A man may be legally absent who has counselled or procured the treasonable act, *ib.* 491
25. The prisoner can only be convicted upon the overt act laid in the indictment. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged, *ib.* 493
26. A person cannot be constructively present at an overt act of treason, unless he be *aiding and abetting at the fact*, or *ready to afford assistance if necessary*, *ib.* 494
27. If the particular overt act of treason charged be advised, procured, or commanded by the accused, he is guilty *accessorily* and not *directly* as principal, *ib.* 494
28. A person in one part of the United States cannot be considered as *constructively present* at an overt act committed in a remote part of the United States, *ib.*
29. The presence of a party, where pre-

sence is necessary to his guilt, is part of the *overt act*, and must be proved by *two witnesses*. *Appendix, United States* v. *Burr*, 500

30. An indictment charging a person with being present at an overt act of treason, cannot be supported by proving only that the person accused caused the act to be done by others in his absence. No presumptive evidence, no facts from which presence can be inferred, will satisfy the constitution and the law, *ib.*

31. The part which a person takes in the war constitutes the overt act, on which alone he can be convicted, *ib.* 502

32. *Quære*, whether he who procures an act may be indicted as having performed that act? *ib.*

33. If proof of procurement is admissible in England to establish a charge of *actual* presence, on an indictment for *levying war*, it is only by virtue of the operation of the *common law* upon the statute of *Edward* III. 503

34. *Quære*, whether there be in this country a similar operation of the common law? *ib.*

35. If proof of procurement be admissible upon a charge of presence, such procurement must be proved in the same manner, and by the same kind of testimony as would be required to prove actual presence, *ib.*

36. The conviction of some one who has *committed the treason* must precede the *trial* of him who has advised or procured it; and the right of the prisoner to call for the record of conviction is not waived by pleading to the indictment, *ib.* 505

37. *Quære*, whether the crime of advising or procuring a levying of war be within the constitutional definition of treason? *ib.*

38. If the overt act be not proved by *two witnesses*, so as to be submitted to the jury, all other testimony is *irrelevant*, *ib.* 506, 507

39. *Levying war* is an act compounded of law and fact, of which the *jury*, aided by the court, must judge, *ib.* 507

40. Appearing at the head of an army would be an *overt act* of *levying war*. So also detaching a military corps from it, for military purposes. *ib.*

TREATY, BRITISH.

See *Limitations*, 1. *Aliens*, 2. 8. *Confiscation*, 1, 2. *Insurance*, 4.

TRIAL.

1. See *Exceptions*, 1, 2. *Evidence*, 3. *Jurisdiction*, 18, 19.

2. The clause of the 8th section of the act of congress for the punishment of certain crimes against the United States, respecting the place of trial when crimes are committed out of the jurisdiction of any particular state, applies only to offences committed in some *river*, *haven*, *basin* or *bay* not within the jurisdiction of a particular state, and not to the *territories of the United States*, where regular courts are established, competent to try those offences. *Ex parte Bollman and Swartwout*, 77

3. See *Admiralty*, 20, 21.

4. The *conviction* of some one who has committed the treason must precede the *trial* of him who has advised or procured it. *Appendix, United States* v. *Burr*. 505

VESSEL.

See *Register*, 2. *Duties*, 2.

VERMONT.

See *Tenants in Common*.

VIRGINIA.

See *Limitations*, 1. *Lease*, 3. *Columbia*,

See *Bank of Alexandria*, 2.

3. *Quære*, whether private acts of the assembly of Virginia, printed by the public printer of that state, under the authority of law, may be read in evidence without further authentication? *Young* v. *Bank of Alexandria*, 384

4. See *Gift*, 2, 3. *Evidence*, 15. *Covenant*, 2.

WITNESS.

1. A witness interested in certain admitted items of the plaintiff's account, is still a competent witness to prove other items. *Smith* v. *Carrington*, 62

2. See *Treason*, 29.

WRIT OF ERROR.

1. If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. *Wood* v. *Lide*, 180

2. The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. *Wood* v. *Lide*. 180

3. See *Appeal*, 4.

FEBRUARY TERM, 1807.

GENERAL RULE.

IT IS ORDERED, that where damages are given by the rule passed in February term, 1805, the said damages shall be calculated to the day of affirmance of the said judgment in this court.

FEBRUARY TERM, 1808.

GENERAL RULES.

1. ORDERED, that all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on the record.

2. ORDERED, that upon the clerk of this court producing satisfactory evidence, by affidavit or acknowledgment of the parties or their sureties, of having served a copy of the bill of costs due by them respectively in this court, on such parties or sureties, and of their refusal to pay the same, an attachment shall issue against such parties or sureties respectively to compel payment of the said costs.

END OF THE FOURTH VOLUME.

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